# THE SECOND PART OF REPORTS AND CASES OF LAW,

Argued and Adjudged in the COURTS at *WESTMINSTER*,

In the Time of the late

# Q. ELIZABETH,

From the XVIII^th^ to the XXXIII^d^ Year of Her Reign.

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Collected by that Learned Profeſſor of the LAW,
*William Leonard*, of the Honourable Society of *Gray's-Inn*, Eſq;

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*With Alphabetical* TABLES *of the Names of the* CASES *and of the* MATTERS *contained in the* BOOK.

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*LONDON*,
Printed by the Aſſigns of *R.* and *E. Atkins*, Eſquires, for *R. Chiſwell* and *Tho. Sawbridge*, in St. *Paul's* Church-yard and *Little Britain*. 1687.

# THE SECOND PART OF THE REPORTS OF CASES IN LAW,

Argued and Adjudged in the COURTS at WESTMINSTER,

In the Time of the late

QUEEN ELIZABETH.

# To the READER.

I Here preſent to thy view and ſtudy, The ſecond Part of the *Reports* and *Caſes*, collected and taken in *French* (by that grave, induſtrious, and Learned Profeſſour and Practiſer of the Common Law, *William Leonard* Eſq; ſometimes of the Honourable Society of *Grays-Inn*) in the Reign of the late Queen *Elizabeth*; which *Reports* were of ſuch ineſtimable value, by reaſon of their authentick Arguments, that they were tranſcribed by divers Honourable and Learned perſons, as may appear by my *Epiſtle* to the firſt part of His *Reports*: theſe, together with the firſt part, being ſelect *Caſes*, by many Eminent *Lawyers* of this *Nation*, thought to be worthy the Preſs. How deſerving the *Authour* is of thy candid cenſure I refer to thy deliberate judgment; *Hic labor, hoc opus eſt*: As for the Work it requires *totum non mixtum hominem*, an intire man, without other diverſions. If thou beſt a repreſentative Warrior, for the lives and patrimonies of thy *Clients*, I here preſent thee with a weapon to defend them; and though the *Military* Profeſſion be very Noble and Honourable, becauſe moſt dangerous; yet the Profeſſion of the *Law*, herein challenges precedency, πρεσβεια becauſe the Sword is but a ſervant to Juſtice, conſecrated by the Almighty, to maintain and defend the *Law*, for if men were juſt, the Sword might be ſheathed: and to ſpeak in the *Dialect* of Sir *John Davies*, in his eloquent Epiſtle to the *Iriſh* Reports; We ſee Heathen Kingdoms ſubſiſt without Religion, and you may imagine a Kingdom to ſubſiſt without Phyſicians, as once *Rome* did, but all men at all times, and in all places, ſtand in need of Juſtice and Law, which is the commenſurate rule of Juſtice, and conſequently *Lawyers*, who are the Miniſters and Secretaries of Juſtice, the Queen and Empreſs of all other Moral Virtues according to the axiom, or Maxim *Conciliarii ſunt organa Juſtitiæ in corpore Politico.* But (Candid Reader) not to defatigate thy clemency, neither to treſpaſs too much upon thy patience with a prolix Epiſtle, I do here tender theſe *Reports* to thy judgment, upon a ſerious and deliberate conſideration, preſuming they (as well as the firſt) may tend to thy uſe and benefit, in the courſe of thy ſtudy and practice of Law, which is all that is deſired.

*The Names of the Learned* Lawyers *Serjeants at* Law, *and Judges of the ſeveral* Courts *at* Weſtminſter, *who Argued the* Caſes, *and were then Judges of the ſaid ſeveral* Courts; *Viz.*

A

*ANDERSON*, Lord Chief Juſtice of the Common Pleas.

*Anger.*

*Attham*, Serjeant at Law, afterwards one of the Barons of the Exchequer.

*Atkinſon*,

*Ayliffe*, Juſtice of the King's Bench.

B

*Beaumont*, Serjeant at Law, after Judge of the Common Pleas.

*Bromley*, Lord Chancellour of England.

*Bacon*, afterwards Lord Chancellour of England.

*Barkley.*

C

*Coke*, afterwards L. C. Juſtice of the Common Pleas.

*Clench*, one of the Judges of the King's Bench.

*Cooper*, Serjeant at Law.

*Clark*, Baron of the Exchequer.

*Coventrie*, after Lord Keeper of the Great Seal.

D

*Daniel*, one of the Judges of the Common Pleas.

*Drew*, Serjeant at Law.

*Dyer*, Lord Chief Juſtice of the Common Pleas.

E

*Egerton*, Sollicitor of the Queen, after Lord Chancellour of England.

F

*Fleetwood*, Serjeant at Law, Recorder of London.

*Fuller.*

*Fenner*, Serjeant, after Judge of the King's Bench: and then after Lord Chief Juſtice.

G

*Gawdy*, Serjeant at Law.

*Gawdy*, one of the Judges of the King's Bench.

*Golding*,

*Golding*, Serjeant at Law.
*Glanvile*, one of the Judges of the Common Pleas.
*Gent*, one of the Barons of the Exchequer.
*Godfrey*.

H

*Haughton*, Serjeant at Law, after one of the Judges of the Common Pleas.
*Hammon*, Serjeant at Law.
*Harris*, Serjeant at Law.
*Heale*, Serjeant at Law.
*Hobart*, after Lord Chief Juſtice of the Court of Common Pleas.

K

*Kingſmill*, Judge of the King's Bench.

L

*Laiton*.
*Leonard*.

M

*Meade*, Serjeant at Law, after Judge of the Court of the Common Pleas.
*Morgan*, Serjeant at Law.
*Manwood*, Lord Chief Baron of the Exchequer.
*Mounſon*, Juſtice of the Common Pleas.

O

*Owen*, Serjeant at Law, after Baron of the Exchequer.

P

*Popham*, Attorney General of the Queen, after L. C. Juſtice of the King's Bench.
*Periam*, Judge of the Common Pleas.
*Pepper*, Attorney of the Court of Wards.
*Plowden*.
*Packering*, the Queens Serjeant at Law.

R

*Rhodes*, one of the Judges of the Common Pleas.

S

*Snag*, Serjeant at Law.
*Snig*, one of the Barons of the Exchequer.
*Shuttleworth*, Serjeant at Law.

T

*Tanfield*, Serjeant at Law: after Lord Chief Baron of the Exchequer.
*Topham*.

W

*Wray*, Lord Chief Juſtice of the King's Bench.
*Windham*, one of the Judges of the Common Pleas.
*Walmeſley*, Serjeant at Law, after one of the Judges of the Common Pleas.

Y

*Yelverton*, Serjeant at Law, after one of the Juſtices of the King's Bench.

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THE

# THE SECOND PART OF Reports and Cases OF LAW,

Argued and Adjudged in the time of Queen *ELIZABETH*, from the Eighteenth to the Three and thirtieth Year of her Reign.

*Mich.* 30 Eliz. In the Common Pleas. *Rot.* 30.

## I. Kirkman *and* Reignold's *Case.*

Leaſes. 1 Cro. 182.

THE Caſe was, That a Leaſe was made unto two, Habendum to them, and to two others for four lives, and the longer liver of them; It was reſolved by the whole Court, That the two named in the Habendum did not take any thing; and that if the firſt two in the Premiſſes of the Deed die, that there ſhall be no occupancy; For the lives of the two in the Habendum was intended an Eſtate to them, and not a limitation of the Eſtate of the firſt two: And ſo it was reſolved, 28 Eliz. in the King's Bench, Rot. 509. in Hubbart and Windſmore's Caſe.

Hubbart and Windſmore's Caſe.

*Mich.* 32 and 33 *Eliz.* In the King's Bench. *Rot.* 19.

## II. Thatcher *and* Damport's *Case.*

1 Cro. 145. 215. ib. Error.

THatcher recovered againſt Damport as Adminiſtrator of one Zouch, The Defendant put in Bail, and afterwards Judgment was given againſt the Defendant in this manner: Ideo videtur Juſticiariis, quod querens recuperet debitum ſuum verſus, &c. and thereupon a Scire facias was ſued againſt the Bail, and a good and lawfull Judgment given againſt them; And they brought a Writ of Error to reverſe the Judgment given againſt them, and aſſigned Error, becauſe Judgment was entred againſt them before a good and lawfull Judgment was given againſt the Defendant himſelf; For Videtur Juſticiariis quod querens recuperet, &c. is not any Judgment; and the Court held, that the Judg-

Judgement againſt the Bail.

ment given againſt the Bail, ought to be reverſed, but that the other Judgment ſhould ſtand ſuch as it is, neither affirmed nor diſaffirmed, but the Bail ſhould not cauſe the ſame Judgment for their diſcharge to be entred, And afterwards came Thatcher and ſurmiſed the nullity of the ſaid Judgment, and prayed that Judgment might be entred for him in forma juris, & habuit: And now upon this new Judgment Damport brought a Writ of Error, and aſſigned for Error the entry of that new Judgment, for before a Judgment was entred, tiel queb. and Thatcher proceeded upon it, and had a Scire facias againſt the Bail, and Judgment thereupon given againſt the Bail: Alſo the Record was removed by Writ of Error, and this ſecond Judgment is merely erroneous, for then there ſhould be two Judgments; and they ſhould give Judgment upon a Record, which was not before them.

Gawdy Juſtice, The Writ of Error is to remove the Record, Si Judicium inde redditum ſit, by which if Judgment be not given, the Record doth remain unremoved, and then they may well enough give Judgment; For the former pretended Judgment was no Judgment at all, and the Record is not removed, As 4 Eliz. Dyer 206. a Certiorari to remove a Record, capt. in Curia noſtra, whereas it was in Curia of the predeceſſor, the Record is not removed. The former Writ of Error was to remove the Record of the Scire facias againſt the Bail which might be removed, although the other Record did remain, for they are two diſtinct Judgments. And ſuch was the opinion of the other Juſtices; And afterwards upon advice of the whole Court, the Judgment againſt the Defendant himſelf was affirmed, but that which was given againſt the Bail was reverſed, becauſe given before Judgment given againſt the Defendant himſelf.

*Trinit.* 32 *Eliz.* In the King's Bench.

## III. Werdman *and* Yate's *Caſe*.

Partition. 1 Cro. 155. 281.

WErdman brought a Writ of Partition againſt Yates and others, who all appeared and confeſſed the Action, and afterwards brought Error, which was entred, Paſch. 27 Eliz. Rot. 43. and they aſſigned Errors, and the opinion of the Court was againſt them, and they ſeeing it, did diſcontinue their Writ of Error, and now they ſued

Error.

a new Writ of Error out of the Chancery, directed to the Lord Anderſon, being dated 19 Nov. 31 Eliz. containing, That whereas a Writ had been directed to him to remove ſuch a Record, That all the Record is not yet removed; wherefore this was to remove the reſidue of the ſaid Record; Upon which Writ was ſent hither a ſmall parcell of the Record, upon which the Plaintiffs ſued a new Writ of Error out of the Chancery, Coram vobis reſidet, and that was Hil. 31 Eliz. and it was entred upon a new Roll of the ſame Term, and not upon the ancient Roll, and thereupon new Errors were aſſign'd in the judicial proces out of the body of the Record.

1. That the Plea was diſcontinued for Pone was awarded againſt three of the Defendants, and idem dies not given to the other two, nor any thing ſpoken of them.

2. Becauſe there were not fifteen days betwixt the date of the Pone, and the Return of it, (ſcil.) the firſt day of the Return, i. the firſt day of Eſſoins, as ought to be by Law.

3. Judgment was given that the Defendants ſhould be amerced, where they appear upon the firſt Proces, and thereupon the Plaintiff ſued a new Writ of Diminution, one to the Lord Anderſon, and the other to the Cuſtos Brevium, And now came and pleaded all the matter aforeſaid, viz. the former Writ of Error, the proceeding in it, and the

diſcon-

diſcontinuance of it, and demanded Judgment if the Plaintiff ſhould have a new Writ of Diminution, upon which the Plaintiff did demurr: Coke, this ſecond Writ of Error is not maintainable: For the firſt Writ ſent to the Lord Anderſon, could not be ſued out of the Chancery, for it is not a Writ of Error, but a Writ of Diminution: For in the Regiſter there are but two Writs of Error, the firſt to remove Record, the ſecond Quod coram vobis reſidet, 2 H. 7. 19. and in the Writ there is not any mention of Error, and therefore it cannot be a Writ of Error, and if there be not any ſuch Writ in the Regiſter, then it is a good argument to ſay there is no Writ at all, as the Lord Dyer argued in the Lady Hale's Caſe, 5 Eliz. 262. in Plowden in the Caſe of the Writ of Eſcheat: Alſo it is againſt all the precedents, that a Writ of Error, Quod coram vobis reſidet, ſhould be otherwiſe entred than upon the firſt Record, and not upon a new Record, and the Writ of Diminution is not an Original Writ, and ought always iſſue out of the Court where the Writ of Error is depending: And alſo the party cannot now alledge Diminution, i. after a Scire facias ad audiendum Errores, which ſee 22 E. 4. 45. by Huſſey: For by the Scire facias ad audiendum Errores, he affirms the Record to be full: So 7 E. 4. 25. After the Defendant in the Writ of Error hath pleaded in nullo eſt erratum he ſhall not alledge Diminution, for the parties are agreed upon the Record, 28 H. 6. 10. after a Scire facias, the Plaintiff ſhall never aſſign Errors in fact, &c. Tanfield contrary, he agreed, that a Writ of Diminution cannot be ſued out of the Chancery, but that will not hurt us, for it is idle and utterly void: And when the Record is removed, it is not material how it comes in, ſo as it be here, for they are both the King's Court, as it is in the common Caſe of Indictments: and then the Writ of Error is to examine the Record, Quod coram vobis reſidet, And although the ſame be in divers Rolls, the ſame is no matter of Exception; but if the Roll be entred in a wrong Office it is not good, but if all be in one Office, the miſfiling of the Roll will be no hurt: So here, it is not ſo formal as it ought; yet it is not any prejudice to us. But the great matter is, if the Plaintiff may aſſign new Errors and have a new Writ of Diminution, two of the Errors aſſigned in the Meſne Proces, but the third is in the Record it ſelf; i. the Judgment. And there is no doubt but that a man may have divers Writs of Error, but he ſhall have but one Superſedeas, and ſo divers Errors, but one delay: Alſo it is not a Writ of Diminution which we have ſued, for I do not ſay that it is a thing below, which is not here, but I ſay that is not a thing below which ought to be, viz. there is not any diſcontinuance; but the Court awarded that Writ for their ſatisfaction, for the non eſſe of the thing ſhall come on the other ſide, and 9 E. 4. the Court awarded a Certiorare to enform themſelves. And he ſaid that after a Scire facias, the Plaintiff may aſſign new Errors, Trin. 20 H. 7. Rot. 84. betwixt Edge-Court and London, a Writ of Error was brought againſt two, and after Errors aſſigned, one of the Defendants died, before a new Writ of Error could be aſſigned: But here the firſt Record is diſcontinued and determined, for which there is not now any Record which may be objected againſt us, nor any thing in it: as 20 H. 7. A man avows for a Rent due at ſuch a day, and is nonſuit; Now he may avow for the ſame Rent, and ſuppoſe the ſame to be due at another day, for he ſhall not be eſtopped by the Record upon which he was nonſuit: and ſo here upon the whole matter the Writ out of the Chancery is not material, and the Roll is not miſplaced, but is in the right Office: Alſo this is not a Writ of Diminution, but a Writ to inform the Juſtices, Wherefore upon the whole matter the Writ of Error will well lie. It was adjourned.

Diminution.

Entry of Records.

Eſtoppell.

*Mich.* 31 and 32 *Eliz.* In the King's-Bench. *Error.*

## IV. Savacres *Caſe.* Rot. 7.

Poſt 185. A Writ of Error was brought by Savacre and the Biſhop of Gloceſter upon a Judgment given in a Quare Impedit for the Queen, and Errors aſſigned. 1. Attachment was awarded againſt the Defendants in the Quare Impedit, retornable Quind. Paſc. at which day Savacre appeared, and caſt an Eſſoyn; and notwithſtanding that, a Diſtreſs was awarded againſt them both, retornable Craſtin. Trinit. and this awarding of the Diſtreſs was erroneous, for the Eſſoyn was, as appeareth, to ſave, &c. and therefore againſt him no Diſtreſs ought to have been awarded: And upon alledging of Diminution the Record of the Eſſoyn was certified, but the ſame doth not appear upon the Plea Roll. 2. This Record is, ideo ipſi in miſericordia, and ſo both the Defendants are amerced for their default of appearance 15 Paſch. whereas Savacre was then Eſſoyned, and ſo no cauſe to amerce him.

Coke, The Original Writ was ſued Mich. 26 Eliz. retorned 15 Hillarii, and then both the Defendants made default, for which an Attachment was awarded, retornable 15 Paſc. and then Savacre appeared, and Judgment given, quod ipſi ſint in miſericordia, in which point the Error is apparent: but I conceive that it is not Error, for upon the Attachment the parties ought to put in Sureties for their appearance; and the ſaid Sureties took upon them, that the Defendants and each of them ſhould appear; and if they or any of them make default, they ſhall be amerced: And ſo here, this Judgment, ideo ipſi in miſericodia, doth refer to the Sureties, not to the parties, for the Defendants ſhall not be amerced until the end of the Suit, and but once onely in an Action: which ſee Book of Entries 464 where there was but one Defendant: and therefore if the amercements ſhall be referred to the Defendant, then it ſhall be ideo ipſe, not ipſi, &c. And that is the Reaſon wherefore the Queen, nor an Infant, ſhall not find Pledges, for no amercement ſhall be upon their default, therefore it were in vain for them to find Pledges, &c. If the Sureties be amerced where they ought not to be amerced by the Law, yet the Defendant ſhall not have a Writ of Error thereupon, for he is not the party grieved by the amercement: and upon that Reaſon it is, if in a Scire facias againſt the Bail erroneous Judgment be given, the Defendant in the Action ſhall not have a Writ of Error. The awarding of the Diſtreſs upon the Roll againſt both, where one of them only made default, is not Error, eſpecially as this caſe is: for although one of them was eſſoyned until the day aforeſaid, yet at that day they make default, and ſo the Diſtreſs well awarded againſt them: and although the Writ was not well awarded, yet when they appear Craſtin. Trinit. at the day of the Retorn of the Diſtreſs, all meſn defaults in the Proceſs are ſaved, and ſo the miſawarding of the Diſtreſs by appearance after is ſupplyed: as 39 E. 3. 7. The Law requires, that in an Action founded upon the Statute of Præmunire, &c. 27 E. 3. the Defendant gave Garniſhment by two Months, yet if the Defendant, not having warning appear, now the Proceſs is good enough: So 9 E. 4. 18. where upon any Proceſs the Defendant doth appear, although the day of appearance be not lawful, yet he ſhall be put to anſwer, and ſee many Caſes there to that purpoſe. And ſo was the Opinion of the Court in the principal Caſe.

As to the ſecond Error, That this Judgment, ideo ipſi in miſericordia, ſhall be reſerved to the Sureties onely, and not to the party, and that the Defendant ſhall be but once amerced in one Action; True it is, he

ſhall

ſhall be amerced but once for one default; but if there be many defaults, the Defendant ſhall be amerced ſeverally for the ſeveral defaults for every offence; and it ſhould be unreaſonable that the Sureties ſhould be amerced, and that the Defendant, who is the principal, ſhould be freed: which ſee in the book of Entries 193. ipſique & plegii ſui in miſericordia, &c.

*Trinit.* 32 *Eliz.* Rot. 76. In the King's-Bench.

## V. Nevil *and* Cook's *Caſe.*

IN an Action of Covenant the Plaintiff declared, That where it was covenanted betwixt the Plaintiff and the Defendant, That each of them upon requeſt ſhould be accountable to the other for all the Corn growing upon ſuch a place, and that upon ſuch account the one of them ſhould deliver to the other the moiety of the Corn, or the profit of it: and whereas the Defendant had taken all the ſaid Corn, ſcil. twenty loads of Wheat, forty loads of Barley, and thirty loads of Peaſe, growing upon the ſaid Lands, and had been required to render account of the ſaid Corn, which he refuſed to do: The Defendant traverſed the requeſt, upon which they were at iſſue, and it was hereupon demurred: and it was moved, that the Traverſe was not good, but the Defendant ought to ſay, that the Plaintiff did not require him modo & forma; but the Exception was not allowed, but the Traverſe was holden good by the whole Court and Judgment was given for the Plaintiff. Covenant.

*Trinit.* 32 *Eliz.* In the King's-Bench.

## VI. Elizabeth Dormer's *Caſe.*

ELizabeth Dormer was indicted upon the Statute of 23 Eliz. of Recuſancy; and Exception was taken to the Indictment, becauſe that theſe words of the Statute were omitted out of the Indictment, viz. [non habens aliquam rationabilem cauſam] But the Exception was not allowed; for Wray, chief Juſtice, ſaid, That upon conference betwixt himſelf and all his companions, it was reſolved by them, That thoſe words need not be put into the Indictment, but are to come on the other ſide. Another Exception was taken to the Indictment, That ſhe being of the age ſixteen years refuſed to come to any Church (contra formam Statut. 1 Eliz. & in malum exemplum, &c. & contra formam Statuti in hujuſmodi caſu editi & proviſi) and the Statute of 1 Eliz. doth not ſpeak of ſixteen years, but the ſame is mentioned in the Statute of 23 Eliz. Fenner was of Opinion, that the laſt Contra formam Statuti ſhould be referred to the Statute of 23 Eliz. Wray contrary, and that it ſhould be referred to the Statute of 1 Eliz. It was adjourned. 1 *Len.* 241.

16 *Eliz.* In the Common-Pleas.

## VII. Cranmer's *Caſe.*

THE Caſe was, That Thomas Cranmer, late Archbiſhop of Canterbury, made a Feoffment in Fee to the uſe of himſelf for life, without impeachment of Waſte, and after his deceaſe to the uſe of his Executors for twenty years, and after the twenty years to the uſe of his Son and Heir in tail. And afterward Thomas Cranmer was attainted of Treaſon, and dyed, ſo as he could not make Executors, but dyed inteſtate 1 Anderſ. 19. More Rep. 100. 1 Len. 196. 3 Len. 20. Dyer 309, 310.

Office Executors, 118. intestate without any assignment. (Note, the limitation was to his Executors and Assigns.) Queen Mary claimed the term limited as aforesaid, and granted the same over, the Heir in tail entred, and Leased the same for years, the Patentee entred, and the Lessee of the Heir of the Tenant in tail brought Ejectione firmæ.

Manwood. All the doubt of this case is, If the said term was in Tho. Cranmer so as he might forfeit it? And he conceived, that the said term was in Tho. Cranmer, and that he had not power onely to dispose of it, but also had possession of it: 11 H. 4. 186. Scire facias 67. And Br. Annuity 17. Such a Grant is good and effectual, and if he do not grant it his Executors shall have it, and yet the term was not limited to him, but he shall have it by implication of Law. 39 E. 3. A Lease was made to one, his Heirs and Assigns during his life, and one year after, the Executors shall have the said term after the death of the Lessee, yet the said term was not limited to him: 7 E. 3. A Lease made for term of live and a year after, in that case the term is conjoyned unto the Estate for life by the act of the Grantor himself; and there is a difference when the Remainder is joyned to the particular Estate by the act of the Grantor, and by any Purchase, Grant, or any act after: for in the first case the Remainder shall be executed, but in the latter not. A Lease for life, the Remainder in tail, the Remainder to the right Heirs of Tenant for life; he in the Remainder in tail dyeth without issue in the life of Tenant for life, now the Fee is executed to the Freehold, &c. and the Heir shall not have a Scire facias where such conveyance is made by Fine. See 17 E. 3. 29. In a Cui in vita, A. Executor of B. came and said, that the Land in demand was Leased to the said B. for the term of his life, the Remainder for the term of eight years to his Executors, and prayed to be received, and they were received. See 19 E. 3. A Lease was made for life to A. the Remainder to his Executors for twelve years: the Lessee for life died, the Executors died, there it is agreed, that the Executors of the Executors should have an Action of Covenant, if they be ousted. And see 20 E. 3. Quid juris clamat 31. A Lease is made to A. for life, and if A. dieth within twenty years, that his Executors shall have the term until the end of such term: and in a Quid juris clamat against A. he saved his term by protestation, which proves, that the term was quodam modo in him. 49 E. 3. A Lease for life unto A. the Remainder to his Heirs and Executors for twelve years, and afterwards the Lessor confirms the Estate of the Lessee for life, to have and to hold the Land to him for life, and thirteen years over to his Executors; the Lessee deviseth the term, and the Devise holden good, which proves, that the term was in him.

Harper, Justice, contrary: Many cases put before may be answered; for in the said case the term is limited to begin immediately, and not by way of Remainder, or after the death of the Lessee, and then the Executors in the life of the Testator are not known, nor able to seek any thing by the name of Executors, and therefore that term shall take its beginning in the life of the Testator: But in the Case at Bar the term is limited to the Executors after the death of the Testator, and the Executor takes the term as a Purchasor, and he hath it not as a Chattel of the Testator, but as his own Chattel. And in the Case of Receipt before cited, the Executor shall be received as Executor, for the term was limited to him as Executor. And here the Statute of 27 H. 8. is to be considered, for it extends as well to Chattels as to Freehold, and the Statute doth execute the possession to the use limited for years, as for life, or in Fee: and here the use is limited to the Executors, and not to the Testator, and therefore it shall not be otherwise transferred. And therefore if a man seised in the Right of his Wife discontinueth, and afterwards the Discontinuee makes a

Co. 1 Inst. 54. b.

1 Cro. 666.

Feoffment

Feoffment in Fee unto the uſe of the ſaid Husband and Wife for their lives, in that caſe the Wife ſhall not be remitted; for the Statute doth transfer according to the uſe, and the uſe was limited for their lives, therefore they ſhall not be in of another Eſtate.

Dyer, chief Juſtice, to the ſame intent: The Feoffor, i. Thomas Cranmer, limits all the uſes, and therefore he ſhall not have that which he hath limited; and it is in the nature of a Reſervation, which ſhall be taken ſtrictly and very ſtrong againſt him who made the Reſervation: and he relied much upon the laſt Reaſon urged by Harper upon the Statute of 27 H. 8. that this was limited to the Executors, and not to him who limited it, and therefore the poſſeſſion ſhall be executed to the Executors, to whom the uſe was limited; and this term ſhall not be Aſſets in the hands of the Executors: And he ſaid, That he had ſeen a Record, 2 H. 8. ſetting forth, That A. having Feoffees to his uſe, deviſed, that his Feoffees ſhould ſell his Lands, who did accordingly; now the money coming by the ſale ſhall be Aſſets, &c. but it is not ſo limited in our caſe, therefore it ſhall not be Aſſets. A Leaſe is made to A. for life, the Remainder to the right Heirs of B. B. purchaſeth the Eſtate of A. the Eſtate in Remainder is not executed, for it is not conveyed by the Grant of the firſt Grantor, but by the Act of another perſon after the Grant. A Leaſe for life to A. the Remainder to a Feme ſole for years, they entermarry, Waſte is committed, the Leſſor brings an Action of Waſte, he ſhall recover as well the Eſtate for years as for life. A. Leaſeth unto B. for life, the Remainder unto the Executors of A. for years, the Remainder over in Fee to a ſtranger, the Remainder for years is good, for the Leſſor cannot limit ſuch an Eſtate to himſelf, and the Executors ſhall take the Eſtate as Purchaſors, and the term ſhall be in abeyance untill the death of A. Co. 13. Rep.

There was a caſe before the Lord Brook in the time of Queen Mary, viz. A Leaſe was made for life, Proviſo, that if the Leſſee dieth within the term of forty years, that the Executors ſhall have the Lands, as in the Right and Title of the Leſſee, pro termino totidem annorum, which do amount to the number of forty years, to be accounted from the ſaid Indenture. The Opinion of the Juſtices of the Common Pleas upon the Caſe was, That the term was not in the Leſſee for life. So this future term in the principal Caſe was not in Tho. Cranmer. But ſee that Caſe cited by Dyer, reported by himſelf 4 Ma. 150. and there the opinion of the Court was, That the ſame was not a Leaſe, but a Covenant.

And afterwards in the principal Caſe Judgment was given for the Plaintiff, That the future term was not forfeited by the Attainder of Cranmer.

## VIII. 7 *Eliz.* In the Common Pleas.

THE Caſe was, J. S. is ſeiſed of a Cloſe adjoyning to the Cloſe of J. D. and J. S. ought to incloſe againſt J. D. J. S. leaſeth his Cloſe to another for years, rendring Rent, J. D. puts in his cattle into his own Cloſe, who for want of incloſure eſcape into the Cloſe of J. S. and before that they be levant and couchant, J. S. diſtrains them for his Rent: It was ſaid by Manwood, Juſtice, that the diſtreſs was not well taken; for there is a difference when the cattel come upon the Lands of another in the default of the owner of the cattel, as by eſcape or ſtray, and where in the default of another: For in the firſt caſe the Lord may diſtrain them before they be levant and couchant; but in the latter caſe not: Alſo a Rent reſerved upon a Leaſe for years, is a new Rent, and not like unto an ancient Rent, due upon an ancient Tenure betwixt the Lord and the Tenant: For, for a Rent reſerved Dyer 317. b. 318. a. Diſtreſs for Rent. Doctor & Student 150. 1 Inſt. 476. Brown 1 part 170. Roll Tit. Diſtreſs 1 part in toto.

Roll 1 part 672. acc. Hob. 265. Brown part 2 170.

reſerved upon a Leaſe for years, or for a Rent charge a man cannot diſtrain the cattel, before they be levant and couchant upon the Lands, although they come upon the Lands by eſcape, eſtray, &c. Dyer, The Lord cannot diſtrain the cattel which eſcape into the Land of his Tenant for want of encloſure of his Tenant before they be levant and couchant: and yet the ſeignory is favoured for the antiquity of it: But here is new Rent, not in reſpect of any ſeignory, but of reſervation upon a Leaſe for years, and therefore no diſtreſs before the cattel be levant and couchant upon the Lands, Quod Harper & Mounſon conceſſerunt, and Judgment was given accordingly.

## IX. 17 *Eliz.* In the Common Pleas.

Writ of Entry in the Per.

THE Caſe was, In a Writ of Entry in the Per, againſt A. and B. A. pleaded ſeveral tenancy: It was holden by Dyer, chief Juſtice, that it is not any plea. Harper Juſtice: In Aſſiſe it is no plea; for here the Land is not in demand: but here it is a good plea, and the Demandant ought to maintain his Writ; Manwood, In no action founded upon diſſeiſin is this good: For although the Demandant by policy will bring his Writ againſt the Tenant of the Land, and another who he will name in the Writ, upon truſt and confidence, and that he will not agree with the Tenant of the Lord in Dilatories, for the Tenant of the Lands ſhall not be received to plead Dilatories; Yet in that caſe ſeveral Tenancy is no plea for the Tenant, but in a Formedon, or other ſuch like action, which is not grounded upon diſſeiſin, if the Writ be brought in ſuch manner as above, the Tenant by policy, that he may have the view, and other reaſonable delay, may plead ſeveral Tenancy, and ſo enforce the Demandant to maintain his Writ, but contrary in the Caſe at Bar, and ſo it was adjudged per Curiam.

Several Tenancy where no good Plea.

## 19 *Eliz.* In the Common Pleas.

## X. Creſwell *and* Cokes *Caſe*.

Dyer 351.

Debt.

Cuſtome.

Heriot.

CReſwell brought Debt againſt Coke, and demanded 200 Marks upon the Statute of 13 Eliz. of fraudulent Deeds, Gifts, &c. upon the ſecond clauſe of the Statute, viz. That all parties, or privies to ſuch fraudulent Deed, willingly putting in ure, avowing, &c. as true, ſimple, and given bona fide, ſhall forfeit, &c. And ſhewed that one A. held of the Plaintiff 12 acres of cuſtomary Lands, and died ſeiſed, And that by the cuſtome of the Manor, the Lord was to have for a Heriot, the beſt beaſt whereof his Tenant died poſſeſſed, and farther ſhewed, that the ſaid A. in his life time, and a little before his death, being poſſeſſed of 30 Horſes, of the value of 200 Marks, gave the ſaid Horſes to the Defendant, with intent to defraud the Plaintiff, and other Lords of their Heriots, and that he went to the Defendant's houſe to ſeiſe his Heriot, and the Defendant then ſtrained the ſaid Horſes, by reaſon of the Gift aforeſaid, for which the Action is brought, To which the Defendant pleaded, that the Plaintiff had ſeiſed one of the Horſes nomine Herioti: and as to the reſt he did demurr in Law. Mounſon Juſtice, was of opinion, that the Plaintiff ſhould recover the whole 200 Marks, although he was defrauded but of one Heriot onely: as if a man be indebted to me in 20l. and he makes ſuch a fraudulent Deed of his goods, of the value of 2000l. although I be defrauded but of the 20l. yet he ſhall forfeit the whole value of the goods ſo conveyed. Manwood Juſtice, was of opinion, that the Plaintiff ſhould recover the value of one of the Horſes; and the Gift by the firſt branch is void, as to the Plaintiff but for

for one of the Horses onely, and not for all the Horses contained in the Gift, for no more than one Horse was fraudulently given: And as by the first branch the Gift is void but for one Horse, so by the second branch the penalty extends but unto one Horse, for the fraud extends but to one Horse, and no farther. And this Action is not a popular Action, but extends onely to the party grieved. And of the same opinion was Dyer chief Justice, and he confessed the Case put by Mounson Justice, where the Debtor of 20l. makes a fraudulent Deed of his goods of 3000l. &c. for the person of the Debtor is chargeable, and peradventure, goods of the value of 2000l. may be put in execution for 10l. but here the person is not charged for the Heriot. Barham Serjeant, the fraud goes to the whole (scil.) to all the Horses: for although the Plaintiff is to have but one Horse, yet he is to have the choice of all the Horses, which of them he will have for the best Beast, and because the choice goes to all the thirty Horses; and by this fraudulent Gift, he is defrauded of his election, which of the Horses he would have, therefore he shall have the value of the whole thirty Horses. But Dyer and Mounson said to the Serjeant, set a price upon any of the thirty Horses, as the best Horse in your election, and demand the value of that Horse as forfeit by the Statute, and then your election is saved to you.

19 *Eliz.* In the common Pleas.

## XI. Gregory's *Case*.

IN the Assise against Arthur Gregory and his wife at Warwick, before Dyer and Barham, Justices of Assise, the husband made default, and the Assise was awarded by default: and the wife came and prayed to be received, and the opinion of the said Justices was, that Receipt lay in that Case; as in other cases of Præcipe quod reddat; and therefore the wife was received. And now Dyer in Banco, demanded of his companions, the other Justices if the Receipt was well granted: And by Manwood and Mounson, Justices, clearly the Receipt lies: For although that the Statute doth not give Receipt, but where the Lands in demand are to be lost by such default of the husband, and in an Assise the Land shall not be lost by the default of the husband, but the Assise shall by taken by default, yet because the husband and wife lose their challenges to the Jury, because the Assise is taken by default, It seemed to the Justices, and also to the Prejnothonies, that Receipt did well lie in this Case.

Assise. 1 Len. 86. Key's steds case cont.

Receipt of the wife.

## XII. 19 *Eliz.* In the Common Ples.

IN an Action upon Escape, the Plaintiff is nonsuit: It was holden, that the Defendant should not have costs, by the Statute of 23 H.8. Note the words of the Statute, i. (Upon any Action upon the Statute) for any offence or personal wrong, supposed to be done immediately to the Plaintiff, notwithstanding this Action, is Quodam modo, an Action upon the Statute, i. by the equity of the Statute of West. 2. which gives expresly against the Warden of the Fleet; yet properly it is not an Action upon the Statute: for in the Declaration in such actions, no mention is made of the Statute, which see in the Book of Entries, 169, 171. And here is not supposed any immediate personal wrong or offence to the Plaintiff: And an Action upon the Case it is not: for then the Writ ought to make mention of the Escape, and that it doth not here; and yet at the Common Law, before the Statute of West. 2. An Action upon the Case did lie for an Escape: and so Dyer, Manwood, and Mounson, costs are not given in this Case. And by Manwood, upon the

No costs upon Nonsuit in an Action upon Escape.

Nonsuit, in an Action upon the Statute of 8 H. 6. the Defendant shall not have costs, for that is not a personal wrong, for the Writ is disseisivit, which is a real wrong.

*Mich.* 19 and 20 *Eliz.* In the King's-Bench.

Prescription. Townsend Table 96. Hern. 709. Tit. Trespass ib. 803. 1 Cro. 898. Rectory *quid.* Jones Rep. 230.

IN Trespass for breaking of his Close, the Defendant justified, to have a way by prescription over the Land in which the trespass is supposed, for carrying of such Tithes Usque ad Rectoriam de D. from such a place: And it was holden by Wray, and the whole Court, that the plea was not good; for in pleading such a way, there ought to be set forth, terminus a quo, & terminus ad quem, And this word Rectory, which ought to be terminus ad quem, is incertain; for a Rectory is a thing which consists of divers things, as Glebe, Tithes, &c. But he ought to have said, the Parsonage House, or other place certain: And afterwards it was shewed to the Court, that the said Rectory did consist onely of Tithes, and so there is not any place certain, as Parsonage House, Barn, &c. to which the Tithes have used to be carried, for the Tithes have used to be let to farm to divers persons, who have carried such Tithes to their own houses, and the Defendant is one of the Farmers of the Tithes. Wray, If your case be such, you are to plead in this manner; That J. S. is seised in Fee of the Rectory of D. and that time out of mind, he, and all those, &c. have used for them and their formerly to have a way to carry their Tithes from such a place over the Land where, &c. unto such a high way, and name a way, which is the next to the place where the trespass was done; the which cause the Defendant pleaded so according to the direction of the Court.

*Hillar.* 20 *Eliz.* In the Common Pleas.

## XIV. Wingfield *and* Seckford's *Case*.

Debt for Rent. Co. 3. Rep. 24.

IN Debt for arrerages of Rent upon a Lease for years, the truth of the case was, That before any arrerages incurred, the land Leased was evicted upon an Eigne Title; The Defendant pleaded, that he owed him nothing: If now he might give in Evidence the said eviction was the Question; and it was the opinion of Dyer, Manwood, and Mounson, that he could not, but he ought to have pleaded it especially; and they denied the opinion of the Preignothories, who said, that the Defendant ought to have pleaded the Eviction, and concluded Judgment of Action; and not rein luy doit, and the Court advised the Defendant to plead accordingly.

Pleadings.

*Hillar.* 20 *Eliz.* In the Common-Pleas.

## XV. Beamont *and* Dean's *Case*.

Dower. Dyer 361.

IN Dower brought by the wife of Beamont, Master of the Rolls, in the time of E. 6. The Defendant said, that he himself, before the Writ brought, did assign a rent of 10l. per ann. to the Demandant, in recompence of her Dower, upon which the Demandant did demur in Law; and the cause was, because the Tenant had not shewed what Estate he had in the Lands at the time of the granting of the Rent, as to say, that he was seised in Fee, and granted the said Rent; so as it might appear to the Court upon the plea, that the Tenant had a lawfull power to grant such a Rent, which was granted by the whole Court, and the demur holden good.

Hill.

*Hill.* 20 *Eliz.* In the Common-Pleas.

## XVI. Hinde *and Sir* John Lyon's *Case*.

IN Debt by the Plaintiff against the Defendant as Heir, he pleaded, That he had nothing by Deſcent but the third part of the Manor of D. The Plaintiff replied, Aſſets; and ſhewed for Aſſets, that the Defendant had the whole Manor of Dale by deſcent, upon which they were at iſſue: and it was given in evidence to the Jury, That the Manor was holden by Knight's-ſervice; and that the ſaid Sir John, the Anceſtor of the Defendant, by his Will in writing deviſed the whole Manor to his Wife, until the Defendant, his Son and Heir, ſhould come to the age of 24 years; and that at the age of his ſaid Son of 24 years, the Wife ſhould have the third part of the ſaid Manor for term of her life, and her Son ſhould have the reſidue: and that if his ſaid Son do die before he come to his age of 24 years, without Heir of his body, that the Land ſhould remain to J. S. the Remainder over to another: The Deviſor died, the Son came to the age of 24 years; and the Queſtion was, If the Son hath an Eſtate-tayl, for then for two parts he is not in by Deſcent? And by Dyer and Manwood, Juſtices, here is not any Eſtate tayl, for no tayl was to riſe before his ſaid age, and therefore the tayl ſhall never take effect; and the Fee-ſimple doth deſcend, and remain in the Son, unleſs he dieth within the age of 24 years, and then the Entail veſts with the Remainders over. But now having attained his ſaid age, he hath a Fee-ſimple, and that by Deſcent of the whole Manor, and a general Judgment ſhall be given againſt him, as of his own Debt: And an Elegit ſhall iſſue forth of the moyety of all his Lands, as well thoſe which he hath by deſcent from the ſame Anceſtor, as any elſe; and a Capias lieth againſt him. But Manwood conceived, That if general Judgment be given againſt the Heir by default, in ſuch a caſe a Capias doth not lie, although in caſe of falſe Plea it lieth. Dyer contrary; and the Writ againſt the Heir is in the Debet & Detinet, which proves, that in Law it is his own Debt: and he ſaid, that he could ſhew a precedent where ſuch an Action was maintainable againſt the Executors of the Heir.

Dyer 124. a. 3 Len. 70. 3 Len. 64. Deviſes.

## XVII. *Hil.* 20 *Eliz.* In the Common-Pleas.

A Man made a Leaſe of Lands by Indenture, to begin after the expiration of a Leaſe thereof made to one Duffam; and in an Action of Covenant brought by the ſecond Leſſee againſt the Leſſor, the Leſſor ſaid, That there was no ſuch Duffam in rerum natura, at the time of the ſuppoſed Leaſe made to Duffam: it was argued, That this Plea doth not lie for the Leſſor, for he is eſtopped to ſay againſt the Indenture, That there is no ſuch Duffam, &c. And alſo if no ſuch perſon was, then the firſt Leaſe was void, and then the ſecond Leaſe ſhall begin preſently, which Manwood and Mounſon granted, and by Manwood, the Defendant ſhall be eſtopped by the Recital of the firſt Leaſe, to ſay, That there was no ſuch Duffam: And although the common Ground is, That a Recital is not an Eſtoppel, yet where the Recital is material, as it is here, it is otherwiſe, for here the ſecond Leaſe is to begin upon the expiration of the recited Leaſe; and therefore in this caſe it ſhall be an Eſtoppel.

Roll. 1. part. 870. Covenant. Eſtoppell.

XVIII. *Mich.* 20 *Eliz.* In the King's-Bench.

Action upon the Stat. of 5 *Eliz.* for Perjury. 3 Len. 68.

IN an Action upon the Statute of 5 Eliz. for a Perjury by three, the Plaintiffs declared, That the Defendant being examined upon his oath before Commiſſioners, If a Surrender was made at ſuch a Court of a Copyhold to the uſe of A. and B. two of the Defendants? The Defendant ſwore there was no ſuch ſurrender made, &c. Exception was taken to the Declaration, becauſe that the certainty of the Copyhold did not appear upon the Declaration: for the Statute requires that in ſuch Caſe the party grieved ſhall have remedy, ſo as it ought to appear in what thing he is grieved; quod fuit conceſſum per totam Curiam. Another Exception was taken, becauſe the Action is given in this Caſe to the party grieved, and it appeareth upon the Declaration, that the Surrender, in the negative depoſing of which the Perjury is alligned, was made to the uſe of two of the Plaintiffs onely, and then the third perſon is not a party grieved, for he claims nothing by the Surrender; and therefore foraſmuch as the two perſons grieved have joined with the party not grieved, the Writ ſhall abate againſt them all, which Wray and Southcote granted.

Abatement of Writ.

XIX. 19 *Eliz.* In the Common-Pleas.

Action upon the Stat. of 13 *E.* 1. of *Wincheſter.* 2 Inſt. 569.

IN an Action upon the Statute of Wincheſter 13 E. 1. againſt the men of the Hundred of A. Barham, Serjeant, took Exception to the Declaration, becauſe it appeareth upon it, that the half year after the Robbery is not yet come; for by the ſaid Statute it is ordained, that the Countrey have no longer time than half a year after the Robbery done, within which time facent-gree of the Robbery, or reſpondent the body of the Miſdeaſors. And here the Action is brought within the half year: And for this cauſe the Declaration was holden to be inſufficient by the whole Court. And the Lord Dyer ſpake much in commendation of that Statute being made for the publick benefit of the whole Commonwealth: for the Law intends when a Robbery is done, That if the Countrey will not purſue the Maleſators, that ſome of them are Receivers or Abettors of the Felons.

Manwood, Juſtice, ſaid, When I was a Servant to Sir James Hales, one of the Juſtices of the Common-Pleas, one of his Servants was robbed at Gadds Hill, within the Hundred of Graveſend in Kent, and he ſued the men of the Hundred upon this Statute; and it ſeemed hard to the Inhabitants there, that they ſhould anſwer for the Robberies done at Gadds Hill, becauſe Robberies are there ſo frequent, that if they ſhould anſwer for all of them, that they ſhould be utterly undone. And Harris, Serjeant, was of Councill with the Inhabitants of Graveſend, and pleaded for them, that time out of mind, &c. Felons had uſed to rob at Gadds Hill, and ſo preſcribed, and afterwards by award they were charged: And note, That the Caſe was, that three men were robbed, and they three joined in the Action againſt the Inhabitants.

20 *Eliz.* In the Common-Pleas.

XX. Colſhil *and* Haſting's *Caſe*.

AN Extent was ſued forth upon a Statute-Merchant by Colſhil againſt Haſtings, for Lands in his poſſeſſion in the County of Southampton: The Sheriff put the Plaintiff the Conuſee in poſſeſſion of parcel

parcel of a House and of Lands, and suffered Hastings to continue in the rest of the House, by reason whereof Hastings kept the possession of the whole, and held the Conusee out; The Conusee, to the intent that he might have full and perfect possession of the whole, cauled the Sheriff, that he did not return the Writ of Extent, upon which it is entred on the Roll, Quod Vice-Comes nihil inde fecit, nec misit breve. Whereupon issued an Alias extendi facias, upon which the new Sheriff did return, That in the time of the old Sheriff, a Writ of Extent issued forth, &c. and that the said Sheriff had extended the Lands; by reason whereof the now Sheriff could not extend them upon the new Writ. It was moved for the Conusee, That the return was not good; For although that the Lands be extended by the first Writ, yet because it is not returned, it is not any Execution in Law, nor could the Conusee have an Assise, which Manwood, Justice, denied: Loare Peignotherry, Our course is, when no return of such Writ is made, to grant an Alias, at the prayers of the party, and to enter upon the Roll, That the Sheriff upon the first Writ, Nihil inde fecit, nec misit breve. And that was taken by the Court to be a good and lawfull course in such Case; for upon such surmise, that no Execution hath been done, and that upon such entry on the Roll, an Alias Breve might be well awarded. And afterwards, this second Writ of Extent was not filed by order of the Court: And note, that the new Sheriff was examined upon his Oath by the Court of the Action, and he said, that he made the return by the advice of Master Plowden, who told him, that he might safely return, that the Land was formerly extended, and although that the said Extent was not returned; yet it is an Execution for the Party. Manwood, Certainly this is an insufficient return: But, perhaps Master Plowden did not know of this entry in the Roll, as aforesaid, for now it appeareth upon Record, that no Execution was done. If this entry had not been, I should well agree with Master Plowden, that the same is an Execution for the party, although it be not returned.

Execution executed. 1 Leon. 145.

19 *Eliz.* In the Common-Pleas.

## XXI. Steward's *Case*.

THE Case was, A. seised of certain Lands in Fee, granted a Rent-charge out of the same to another, and afterwards aliened the Lands to a stranger. The Grantee in a Replevin did avow for the Rent, and the other party pleaded, that nothing passed by the Deed: It was holden by the whole Court to be no plea, nor can any issue be joined upon it, but the Plaintiff ought to have said, That he did not grant by the Deed: For the same is a Rent newly created, and which had not his essence before the grant, and it cannot properly be said, That nothing passed by the Deed, but not of a thing that is in esse, but of things not in esse, That he did not grant, is the most natural issue, for a thing not in esse, non potest transire.

XXII. 19 *Eliz.* In the King's-Bench.

IN an Action upon the Case upon a Trover and Conversion to his own use per venditionem quibusdam hominibus ignotis, the Defendant pleaded, That the goods were bailed to him, to bail over to J. S. to whom he had delivered them, absque hoc, that he did convert them to his own use, per venditionem hominibus ignotis. It was moved by Egerton, that that matter is not traversable, quod Wray concessit, for the

Trover and Conversion.

the converſion to his own uſe, is the cauſe and ground of the Action, and not the ſelling of the goods, &c.

XXIII. *Mich.* 19 *and* 20 *Eliz.* In the Common-Pleas.

Outlawry.

A Man was outlawed in the Court of Huſtings of London; and the Huſtings in which the Judgment of Outlawry was given, was holden two Weeks next after the laſt Huſtings; ſo as there was but two Weeks betwixt the two Huſtings, whereas commonly the Huſtings is holden but every three Weeks, and now the Sheriffs of London were in doubt, if they might ſafely return the Outlawry, without danger of an Action upon the Caſe brought againſt them by the party outlawed; It was holden by Dyer and the whole Court, that they ought and might ſafely return the ſaid Outlawry: for the Lord Dyer ſaid, That there is a Record in the time of R. 2. whereby it appeareth, that in London they might hold their Huſtings every Week, if they pleaſed, and afterwards he commanded Moſley and Chriſtopher, Secondaries, to return the Outlawry, which was done accordingly.

19 *Eliz.* In the Common-Pleas.

XXIV. Loveleſſe's *Caſe.*

Debt upon Recognizance. 1 Cro. 608. 817.

LOveleſſe, Serjeant, brought a Scire facias upon a Recognizance, and had Judgment upon default, Quod habeat Executionem, and afterwards he brought an Action of Debt upon the ſaid Judgment, and exception was taken to the Action: for that he ought to proceed upon the Judgment given upon the Scire facias, and ought to ſue Execution according to the ſaid Judgment by Elegit, or Scire facias, but not by Capias; but the Exception was not allowed; For the Recognizance is a Judgment in it ſelf, and an Action of Debt will lie upon it; without any Judgment in the Scire facias; And Debt lieth as well upon the Judgment, as upon the Recognizance it ſelf; and ſo was the opinion of the whole Court.

XXV. *Eliz.* In the Common-Pleas.

Brent's *Caſe.*

Dyer 340. b.

THE Caſe was, That Robert Brent being ſeiſed of Lands in Fee, made a Feoffment thereof unto the uſe of himſelf and Dorothy his Wife, for their lives; and if he do ſurvive his ſaid Wife, then to the uſe of him the ſaid Robert and ſuch a Woman as he ſhould after marry, for the Jointure of ſuch Wife; the Remainder over to a ſtranger in Fee: And afterward (with the privity and aſſent of the Feoffor) he in the Remainder and the Feoffees join in a Feoffment to divers perſons, (Note, both Feoffments were after the Statute of 27 H. 8.) and afterwards Robert Brent, the Husband, levyed a Fine to the ſame uſes, and took a ſecond Wife, and died: The ſecond Wife, by the aſſent and commandment of the firſt Feoffees, after the five years paſt after the Fine, entered to raiſe the uſes mentioned in the firſt Feoffment limited to the ſecond Wife.

This Caſe was argued by all the Juſtices of the Court of Common-Pleas: and Mounſon, Juſtice, conceived that the Entry of the Wife was lawfull, and that without the aſſent or commandment of the Feoffees. An uſe may be limited to one who is in eſſe, or in poſſe; and the ſecond Wife here was in eſſe when the uſe was limited, and ſhe was alſo in poſſe;

for

for by poſſibility the firſt Wife might die, and alſo by poſſibility the Feoffor might take to Wife this Woman. A Gift to one who is not in eſſe or in poſſe, is void. A Gift to J. S. & primogenito filio ſuo, if he have a Son alive at the time of the Gift, he ſhall take jointly with his Father; but if not, yet after his death he ſhall take by way of Remainder. A uſe is nothing elſe but a truſt and confidence, and was not any Inheritance by the courſe of the Common Law; for no mention is made of uſes in our ancient Books, when the Common Law greatly flouriſhed, as in the time of E. 1. and E. 3. and alſo uſes are not ſubject to the grounds of Law: And although divers Statutes have been made for the avoiding of divers policies for the gaining of Lands in Mortmain, yet the makers of the ſaid Statutes could not find out any ſuch conveyances to uſes. See the Statute of Religioſis, 7 E. 1. and ſee 29 H. 8. tr. Mortmain 39. There is a glance at uſes 44 E. 3. 25. b. the words are, En foy demiſt, &c. and the Feoffees ſued Livery. And the firſt mention of Uſes in our Books is 30 H. 6. Br. Title to Uſes 49. and the ſame caſe Deviſe Fitz. 22. In the time of E. 4. Uſes were more frequent; for 5 E. 4. 8. divers caſes concerning Uſes are there put, &c. and afterwards 1 R. 3. a new Statute was made for the benefit of Ceſtuy que uſe: and afterwards the Statute of 4 H. 7. for the Wardſhip of Ceſtuy que uſe: and afterwards the Statute of 27 H. 8. which made an end of Uſes. Theſe Uſes at the firſt were of no value, but afterwards by continuance Communis error facit jus, ſo as they were taken and eſteemed as Inheritances: And they cannot be more fitly reſembled to any thing, as to Copyholds, which at beginning were but Tenures at will, and were not known at the Common Law, but now they are in the ſame reputation in Law as Inheritances: and they are not guided by the Rules of the Common Law, but by the intent of the parties: which appeareth in this Caſe at Bar to be, That the who ſhould be the ſecond Wife of Robert Brent, the Feoffor, ſhould have the Lands ut ſupra: and therefore this Uſe ſhall riſe, and the Statute of 27 H. 8. ſhall draw the poſſeſſion after it.

Co. 1 Rep. Shelley's Caſe.

Manwood, Juſtice; As to the commencement of Uſe, it hath been as long as mankind hath been guided by Reaſon: and although no mention is made of Uſes in our ancient Books, yet that is no argument that Uſes have been but of late times. Uſes were not common, therefore were not at all, is a Non ſequitur. As long as Wills have been, Truſt and Confidence hath been; and alſo as long as Marriage hath been. See the Writ of Cauſa Matrimonii prolocuti: and ſee the Statute of Marlbridg, cap. 6. there is mention of falſa Feoffamenta: And note, by other words of the ſaid Statute there was a Truſt, but it was a falſe truſt to deceive another; and therefore ſuch a miſ-ſhapen Truſt is not called a Truſt by the ſaid Statute, but a Colluſion. And Mr. Littleton ſaith, That Ceſtuy que uſe ſhall be ſworn upon Enqueſts, which was not enacted by any Statute, but practiſed and put in ure by reaſon of Common Law. And I have ſeen divers ancient Deeds of Uſes: and in ancient time, you ſhall not find that any would purchaſe Lands to himſelf alone, but had two or three joint Feoffees with him; and he who was firſt named in the Charter of Feoffment, was Ceſtuy que uſe, although that no Uſe was declared unto him upon the Livery, and ſo it was known by the occupation of the Lands. And the reaſon why no mention is made in our ancient Books of Uſes, is, becauſe men were then of better Conſciences than now they are, ſo as the Feoffees did not give occaſion to their Feoffors to bring Subpœna's to compell them to perform the Truſts repoſed in them.

As to that which hath been ſaid, That Uſes have taken their beginning after the Statute of Weſt. 3. For before the ſaid Statute, if a man had made a Feoffment in Fee without declaring any uſe, it ſhould be to the uſe of the Feoffee, becauſe there is a ſufficient conſideration betwixt the

the Feoffor and Feoffee to raise the use, i. the Seignory created by the Law betwixt them: but now by the said Statute such consideration is taken away; and then upon such Feoffment, without consideration or declaration of use, it is to the use of the Feoffor himself; the same is no reason against them: for although that an Use implied was not before the said Statute of West. 3. yet a Use expressed was; and if before the said Statute the Feoffor had declared an Use; the same had been good: as at this day, a Gift in tail, or a Lease for life, is made to another use, yet notwithstanding that the Law doth create a Tenure upon the Lease or Gift, yet the use expressed shall be good. And although Uses are of such Antiquity, yet they are not directed by the Rules of the common Law, but by the Will of the Owner of the Lands: For the Use is in his hands as clay is in the hands of the Potter which he in whose hands it is may put into what form he pleaseth: And notwithstanding that now the possession be executed to the Use, yet the property and quality, as abstracted from the possession, shall not be drowned in the possession: and so for as much as Uses were by permission of Law guided at the wills of the parties, so also shall be the possessions: And so because, That an use, as abstracted from the possession, might have been well limited to the Wife which should be, notwithstanding that at the time of such limitation such a one was not in esse, in the same manner it shall be now, when the possession is presently executed to the use: and so in this case, the second Wife shall be capable of this use, according to the will and direction of the Owner. If a Feoffment in Fee be made to the use of B. for life, and if A. before such a day shall pay 10l. to the Feoffor, then to the use of the said A. for life, the same is a good use to begin upon the said condition; and yet if it had been limited in possession, it had been otherwise: and that an Use may begin upon a contingency, see the case 27 H. 8. 5. A Covenant is made by Indenture betwixt A. and B. that the Son of A. shall marry the Daughter of B. upon which B. pays 100l. to A. and the said A. doth covenant, that if the said marriage doth not take effect, that then the Feoffees of the said A. shall suffer the said B. his Executors and Assigns, to have the issues and profits of certain Lands, until B. his Executors and Assigns, shall be contented and satisfied of the sum aforesaid by the said A. his Executors or Assigns, there, if the marriage doth not take effect, upon such contingent, the use shall rise to B. And see 30 H. 8. Br. Feoffs to Uses 50. A. covenants with B. that then B shall enfeoff A. of the Manor of D. then B. and his Heirs shall be seised of the Manor of D. to the use of the said A. and his Heirs: Now if A. enfeoffeth B. ut supra, then, &c. vide librum. And here in our case, the second Wife doth not hold joyntly with her Husband, for their Estates do not begin together, for the Husband is in of his ancient Estate which he had during the first marriage, notwithstanding the words of limitation to the said Husband and his second Wife, but she shall take by way of Remainder.

Harper, Justice, Uses began about 18 E. 2. after which time there was such a general liking of them, that they were anew used, but they did not come into common practice before the time of King Henry the sixth, when the great contention fell out betwixt the two great Houses of York and Lancaster, at which time Uses were in great estimation for the safety of Inheritances. Afterwards, Uses by practices became mischievous, and prejudicial to the publick Justice of the Realm, and to many particular persons; for some timentes implacitari, conveyed their Lands secretly to uses, so as he who had right knew not against whom to bring his action: and for that, divers Statutes have been made to enable the Subject to implead the perno of the profits, 4 H. 4. 7. 11 H. 6. 4. 1 H. 7. And as to the making of the Statute of 27 H. 8. the truth is, that the King was displeased for the loss of Wardships, and other injuries done to him; for which cause he complained

complained to the Judges of the defect of the Law in that case who therefore shewed unto the King the causes of those injuries and losses to the King; and farther shewed to the King, That if the possession might be joyned to the use, all would go well, and all the injuries, wrong, and loss, which came to the King by reason of such Uses, Wills, and secret Feoffments, would be avoided: For which the King commanded his Council to frame a Bill to that purpose, and present it to the Houle of Commons in the 24 year of his Reign, but it was then rejected; and the King at that time would have been contented, that the fourth part of the Land onely should descend: and from that time the King stayed farther proceedings in the said cause until 27 H. 8. at which time it took effect: And their cure was to pen the Statute so precisely, that nothing should be left in the Feoffees, but that the whole Estate should be executed by the Statute, so as the said Statute did utterly take out all from the Feoffees. Whereas it hath been said, That a Use hath been as long as any Marriage hath been, and so conceived upon the Writ Causa Matrimonii prolocuti, the same is not any reason; for in that Case there is not any Confidence or Trust: for if the marriage doth not take effect, the woman shall have her Writ de Causa Matrimonii prolocuti. In Conveyances we are to respect two things, the form, and the effect of it; and in all cases where the form and the effect cannot stand together, the form shall be rejected, and the effect shall stand. A Lease for life is made to a Feme sole, she takes Husband, the Lessor confirms to both of them; the Husband cannot take any Estate presently according to the words of the Confirmation; but because the Will of the Lessor is, that an estate shall accrue to the Husband, he shall have it as the Law will, by way of Remainder. So Lands are given to an Abbat and a secular man, the form of the words purport a joynt Estate, but that by Law cannot be; and therefore they shall take as the Law will, rather than not at all. In our case here, The limitation of the Use cannot be pursued precisely according to the words, which are, viz. If the Husband over-live his said first Wife, then to the use of the said Husband and his Wife which shall be; which in words is a joynt Estate: and therefore the words shall be construed, After the death of the first Wife, unto the use of the Husband until he marrieth, and afterwards to the use of him and his second Wife, in which case they shall take joyntly.

Dyer, chief Justice, As to the beginning of Uses, he conceived that the same was immediately after the Statute of Mortmain, at which time all their shifts then in practice were found out: which see, the Statute of Mortmain, 7 E. 1. Stat. de Religiosis: for which cause they were after driven to find out other shifts not provided for by the Statute, which were espyed by the making of the Statute of 15 R. 2. cap. 5. and in that Statute these words, Behoof and Use are used; which is the first place those words have been used in our Law, and yet long time before that Statute Uses had been in practice, as appeareth in the Exchequer, 34 E. 3. the which in the time of Queen Mary, when the said Record was shewed in the Exchequer to the Justices, the effect of which Record was, That Walter de Chirton, who was Customer of the King, became indebted to the King in the sum of 18000l. and with that the King's money had purchased in the name of his friends, to defraud the King, many Lands, and took the profits of them; those Lands so purchased were extended to the use, and for the King, in payment of his Debt, as well as if Walter de Chirton himself had been seised of them, and that by the advice of the Chancellor and the chief Justices. Now Uses by tract of time have grown in credit, so as Cestuy que use have been sworn in Inquests, and by the Law they might justifie the maintaining of their Feoffees when they had been impleaded, which they could not have done if they had not more interest in the Lands than strangers:

See Bacon's Reading upon this Stat.

and they (Uſes) have been in ſuch reckoning and account ſince, that an Uſe hath obtained the name of an Inheritance, and is now reputed amongſt the Eſtates of Lands in our Law; and therefore we ſay in Speeches, and in penning of Statutes, Eſtates in poſſeſſion, and Eſtates in uſe: and a Uſe cannot be limited to Pariſhioners, no more than the Land it ſelf; ſo as there is a great affinity betwixt the words, Lands and Uſe. It is to be granted, That the Statute of 27 H. 8. doth deveſt all out of the Feoffees, yet it doth not deveſt it before that the uſe be veſted in Ceſtuy que uſe; for the words of the Statute are, That the poſſeſſion ſhall be executed in ſuch manner, quality, and degree, as was the Uſe; therefore the veſting of the Uſe ought to precede the execution of the poſſeſſion to it. And he was of opinion, That this future Uſe in the principal Caſe limited to the ſecond Wife did remain in the Feoffees at the firſt, but that they had deſtroyed it by their Feoffment; for the ſecond Wife at the time of the Feoffment was not known, and therefore it ſhall now accrue: and he was alſo of opinion, That this limitation to the ſecond Wife was void at the beginning; for the ſecond Wife was not a perſon able to take, when the Eſtate and Uſe limited to the firſt Wife was determined, and therefore ſhe ſhall not take at all: and if ſuch an Eſtate had been limited in poſſeſſion, it ſhould not have veſted, no more than now.

Mounſon, Juſtice; When the Feoffor and the Feoffees joyn in a Fine of that Land, within which the uſe in future is wapped, he conceived, That the Uſe being in abeyance and conſideration of the Law, could not be touched by the Fine. It is to be confeſſed, That an Uſe may be diſcontinued: See 4. H. 7. 18. A Feoffment made to the uſe of A. for life, and after to the uſe of B. in tail, &c. A. makes a Feoffment in Fee, and dieth, the ſame is a diſcontinuance of the other Uſes: and ſee 27 H. 8. 29. And in our Caſe, the Uſe might ariſe without any Entry of the Feoffees; for the Uſe is not diſcontinued, but the Feoffees are barred by the Fine: And he was alſo of opinion, That this Uſe might take effect without any Entry, and take effect according to the limitation.

Manwood, This Eſtate which is limited in uſe to the ſecond Wife, becauſe it cannot veſt in her becauſe not known, the Feoffees are yet content with it, and this Uſe is to grow out of their Eſtates at the ſeaſonable time: Then when they joyn in a Feoffment, their Eſtate which was the root of the Conveyance, and the Uſes which are the branches, ſpring not till ſhe dieth; and therefore if the Eſtate of the Feoffees, which is the root of the Uſes, be deſtroyed by alienation of the Land before the Uſes have their being, as in our Caſe it is, becauſe that then the ſecond was not known, no uſe can afterwards riſe, for by the Feoffment they are deſtroyed, and alſo every poſſibility of them. But if the Uſes had been in eſſe, ſo as the perſons to whom they are limited are known, then the Statute ſhall execute the poſſeſſion to ſuch uſes. And as to that which hath been objected by my Brother Mounſon, That the Law ſhall keep and preſerve the Uſe, and that notwithſtanding any thing done by the Feoffees at its due time it ſhall riſe: That cannot be; for the Statute of 27 H. 8. doth not ſpeak of ſuch Uſes as this in our Caſe, but of ſuch Uſes onely, of which one may ſay, ſuch a uſe is limited to ſuch a perſon and ſuch to ſuch a perſon, &c. and ſuch Uſes are onely executed by the Statute. It may be demanded, What Eſtate the Feoffees have in the Lands until ſuch uſes be executed? It may be anſwered, A Fee-ſimple determinable, as the Lord hath when he entereth upon his Villein Donee in tail: And I conceive, That this uſe was not in Cuſtodia Legis, quia de minimis non curat Lex: and the uſe was ſuch a thing of which the Law took no knowledge; and in caſe of an Eſtate in poſſeſſion, ſuch an uſe in abeyance ſhould be bound: As a Leaſe for life unto A. the Remainder to the right Heirs of B.

A. ſuffers

A. ſuffers a common Recovery in the life of B. who afterwards dieth, and afterwards A. dyeth, the Heir of B. is bound, for he had not right at the time of the Recovery. This Fine levied by the manner ſhall not deſtroy the uſes limited to the ſecond Wife; for as to the Feoffees, they have nothing to doe with the Lands to transfer any Eſtate againſt the former limitation; for the Statute leaves nothing in the Feoffees, but veſts all in Ceſty que uſe, and that which cannot veſt in him to whom it is limited, ſhall return to the Feoffor: As if I make a Feoffment in Fee to the uſe of my ſelf for life, and after to the uſe of my ſecond Wife, all the Fee is now in me, and when I take a ſecond Wife, then the Feoffees ſhall be ſeiſed to the uſe of ſuch Wife in Remainder for her life: but in the Caſe at Bar, the Feoffees at the time when this ſecond Wife was in eſſe, had not any thing in the Lands, for they had departed with all their Intereſt before by their Feoffment and Fine.

Note, That by the firſt Feoffment the uſe was limited to D. the firſt Wife of the Feoffor, for term of her life, the Remainder in tail to A. Brent, the Remainder in Fee to one Broughton, and all theſe uſes were executed by the Statute; but theſe perſons were not parties to the Livery, but onely the Feoffees, which had not any thing: Then when they make their Letter of Attorney to make Livery of ſeiſin (not being ſeiſed of the Land) the Attorney onely is a Diſſeiſor, and ſo nothing paſſed from the Feoffees, if any right had been in them: and for another reaſon nothing paſſed by this laſt Conveyance out of the Feoffees, for the parties to the latter Conveyance had notice of the uſe, and ſo it appeareth by the ſecond Indenture, the which makes mention of the firſt uſes, &c.

Dyer, Here in our Caſe, the Founders of theſe uſes, i. the Feoffor and the Feoffees, have an intent to overthrow theſe uſes, for at the Common Law the Feoffees might doe it of themſelves; As if the Feoffees had made a Feoffment in fee in conſideration of Money to others who had not notice of the uſes, now the uſes are gone, and the ſecond Feoffees in ſuch Caſes were ſeiſed to their own uſes. I well know, That by this Feoffment all is deveſted out of the Feoffees, which might veſt in the perſon to whom the uſe is limited; but here this uſe which was limited to the ſecond Wife, could not upon the limitation of it veſt in any perſon; and therefore it ſhall remain in the Feoffees who are put in Truſt with it, and therefore have intereſt in the Lands until all the Truſts be performed: and therefore the ſecond Wife was adviſed by her Council to make her Entry in name of the ſurviving Feoffee, and the intereſt which the Feoffees have in the interim, untill the execution of all the uſes, is a Fee-ſimple determinable; for the whole intereſt is not deveſted or driven out of the Feoffees untill the whole Truſt be accompliſhed, i. untill all the uſes limited upon the Feoffment are executed, and have their full perfection.

And whereas it hath been alledged on the other ſide, That upon the ſecond Feoffment nothing paſſed out of the Feoffees, for which it ſhall not be ſaid in Law their Livery, but that the Attorney ſhall be ſaid the ſole Diſſeiſor; As to that I conceive, That whatſoever was loſt in the Feoffees paſſed by that Livery. If he in Reverſion upon an Eſtate for life makes a Charter of a Feoffment, and a Letter of Attorney to make Livery of ſeiſin without words ad expellendas omnes, &c. if Livery be made by force thereof, the Fee-ſimple ſhall paſs: And he cited a Caſe which was argued before all the Juſtices of England, reported by himſelf 2 and 3 Ma. 131. Divers Leaſes for years were made of the Demeans of an Abby, after which the Reverſion was granted to the Countels of Richmond for life, after which King Edw. 6. granted the Reverſion in Fee to the Earl of Warwick, who made a Feoffment of

all to certain perſons, to the uſe of his eldeſt Son and his Wife for her Jointure, with a Letter of Attorney to make Livery and ſeiſin; the Attorney made Livery accordingly, and by that Feoffment and Livery, it was adjudged, that the Fee-ſimple did paſs: So in our Caſe, upon this ſecond Feoffment, a Diſſeiſin is done to D. the firſt Wife, and yet the right of the Feoffees doth paſs thereby; and although it ſhall not be taken in Law their Livery, yet it ſhall be adjudged their confirmation, becauſe they have joined in the Deed, and that ſhall bind their right to eſtabliſh the ſame in the new Feoffees, as if the Diſſeiſee join in a Feoffee by Deed with the heir of the Diſſeiſor: And as to that which hath been objected, that becauſe at the time of the Feoffment, the Feoffees had not any thing, &c. and therefore nothing ſhall paſs: and they have likened to the Caſe, where the Father is diſſeiſed, and the Son and heir doth releaſe to the Diſſeiſor, the ſame ſhall not bind the heir after the death of his Father: The ſame is not like our Caſe; for there is a great difference betwixt a Releaſe and a Feoffment; for if the Son diſſeiſe the Father, and maketh a Feoffment in Fee in the life of his Father, notwithſtanding that he had not any right at the time of the Feoffment, yet he is bound.

*Trin.* 29 *Eliz.* In the King's-Bench. *Rot.* 342.

## XXVI. Thurkettell *and* Tey's *Caſe.*

1 Cro. 110, 111.

IN Debt by John Thurkettell againſt Edw. Tey, and Mary his Wife, Executrix of Robert Thurkettell, the Caſe was, That Agnes Thurkettell, Mother of Robert, the Teſtator, deviſed certain Lands to Robert, and afterwards deviſed 40 l. to the Plaintiff, John, upon condition, that the ſaid John, Cum requiſitus eſſet acquietaret, & retaxaret prædict. Roberto omnes actiones reales & perſonales, querelas, &c. prædict. 40 l. per dict. voluntat. legatis tantummodo exceptis; Agnes died, Robert made two Bonds to John, The firſt was endorſed to pay 20 l. parcell of the ſaid Legacy, within a year after the death of the ſaid Agnes, ſo as the Plaintiff releaſe according to the will of the ſaid Agnes. The ſecond Obligation was with the ſame condition, to pay 20 l. reſidue of the ſaid Legacy, within two years after the death of the ſaid Agnes, upon condition to releaſe, ut ſupra, and all this matter was pleaded in bar; And farther, That Robert required the ſaid John to make the Releaſe, &c. which he refuſed, and they were at iſſue upon the requeſt, and it was found for the Plaintiff; i. Quod dict. Robert. non requiſivit, &c. upon which Verdict Judgment was given for the Plaintiff; upon which the Defendants brought Error, becauſe it appeareth upon the Record here, quod Billa prædict. proſecuta fuit infra duos annos poſt mortem dict. Agnet. & ſic ante diem ſolutionis: For the ſecond Bond, ſee 46 E. 3. 28. by Finchden and Perſay, and ſee there, by Perſay, That if my Writ be brought before the day of payment, and doth depend in ſuit till after the day of payment, that my Writ is made good; for at all times the Defendant was my Debtor. And afterwards in the principal Caſe the Judgment was affirmed in the Exchequer-Chamber: and note, that the day of payment did incurr, pendent the Writ.

29 *Eliz.* In the Exchequer.

## XXVII. Lightfoot *and* Butler's *Case.*

IT was ſaid in this Caſe by the Solicitor General, That if one holdeth of the Queen, as of her Manor, he ſhall not have the privilege of the Exchequer for that cauſe; But if the King grants Tithes, and thereupon reſerveth a Rent, nomine decimæ, and a Tenure of him, there he ſhall have the privilege: The principal Caſe was, that one of the parties claimed the Lands in queſtion as his Freehold, but holden of the Queen, as of ſuch a Manor; and the other claimed it as Copyhold, holden of the ſame Manor; And the Freeholder did ſuggeſt in the Exchequer, That the demands of the Manor are not indifferent. Clark, Baron, If it be ſo, this Court ſhall have juriſdiction. Manwood, If the matter paſs againſt you wrongfully, wherefore may you not have an Aſſiſe? And the Caſe of Beaumorris was cited (but I remember not to what purpoſe) i. The Mayor and Commonalty of Beaumorris were Patrons of a Chantry; and they and the Chantry Prieſt made a Leaſe for years by Indenture, in the end of which was this Clauſe, In cujus rei teſtimonium, tam the Prieſt, quam the Mayor and Commonalty have put their common ſeal, and it was moved that there was not any ſeal for the Prieſt, for he could not have a common ſeal with the Mayor and Commonalty. Clark, Twenty men may ſeal with one ſeal, and they may alſo ſeal with one ſeal upon one piece of Wax onely, and that ſhall ſerve for them all, if they all lay their hands upon the ſeal together. Manwood, They may all ſeal with one ſeal, but upon ſeveral pieces of Wax. Gent, when many are parties to a Deed, the words are Sigilla omnia; which cannot be aptly ſaid in this Caſe, where all ſeal upon one piece of Wax. Co. 4. Inſt. 118, 119.

29 *Eliz.* In the Exchequer.

## XXVIII. Barns *and* Smith's *Case.*

EManuel Barns, Executor of Barns, late Biſhop of London, brought Debt for arrerages of Rent, reſerved upon a Leaſe for years, of certain Mines demiſed to Smith, i. Mines called Argil, and Mines called Greenbourn; and it was againſt the Executors of Smith. The Defendant pleaded, as to parcel non detinet, and as to the other parcel of the arrerages, That in the Indenture of Leaſe, there is a Covenant, That if it ſhall happen that the ſaid Leſſee be hindred, Quo minus Mineriis, præd. gaudere poſſit; That then ſo much Rent ſhould be deducted anno, to the value of the Mine, that he could not enjoy, &c. And he ſaid, that he was hindred, Quo minus gaudere potuit Mineriis præd. &c. and iſſue was joined, that the Leſſee could not enjoy, &c. and it was found for the Plaintiff. It was moved by Coke, in arreſt of Judgment, That here is not any place ſhewed where theſe Mines were, ſo as it doth not appear from what place the Viſne ſhould come; as if in an Action (as here) the Plaintiff declares of a Leaſe made of Lands, called R. in ſuch a County, the ſame is not good. The iſſue here is, Non potuit fodere in præd. Minera de Greenbourn, for the ſpace of ſeven years and an half, from whence ſhall the Viſne come for trial of it? Not from Durham where the Leaſe was made; for no affinity or nearneſs is betwixt the place where the Leaſe was made and this iſſue. But if the iſſue had been, That the Leſſor had not any thing in the Mines at the time of the Leaſe, that might be tried where the Leaſe was made: Another 3 Len. 171.

exception was, becauſe that the plea is; Quod non potuit fodere, in 3, 4, 5, 6, 7, 8. dimidio, 10, & 11. and that appears to be ſeven years and a half, and the Jury find that he could not digg, per ſpatium ſeptem annorum tantum, without ſpeaking of the half year, and ſo they have not given a full Verdict: And as to the firſt Exception, it was ſaid, If a thing be alledged in pleading which is iſſuable, and there is not laid down any place of it, although that no iſſue be joined upon it, yet becauſe he hath prevented the other of his plea to it, Judgment given in ſuch caſe ſhall be reverſed: and ſo it was rated, betwixt Matthew and Stanſham: So upon the Statute of Uſury, the Informer charged the Defendant, that by way of corrupt bargain he hath received ſo much, and doth not ſhew the place, although no iſſue was joined upon it, but they were at iſſue upon another point, yet if Judgment in ſuch caſe be given, it ſhall be reverſed. And in all Actions upon the Caſe, where Requeſt is neceſſary, and the Plaintiff ought to alledge it; the place of the Requeſt muſt be ſhewed: and he ſaid, That ſuch iſſue was to be tried where the Mines leaſed are; and here no place is alledged, where the Mines are, but onely in the County of Durham; and yet a Viſne of the City of Durham hath tried the iſſue, which ought not to have been, but the Viſne ought to have come, De Corpore Comitatus. Clark, Baron, If the iſſue be joined upon taking of the profits, it ſhall be tried where the Land is, but Non debet or detinet, where the Leaſe is made. Coke, The iſſue is, Non potuit fodere, and that is local; therefore it ſhall be tried where the Mines are. Manwood, Non potuit fodere, Non potuit gaudere, are not local; but Non fodit, Non gaviſus fuit, is local, and ſhall be tried where the Mines are: and here it is not ſhewed how he was hindred to dig, &c. and the iſſue is to be de poſtatia, non de actu. Tanfield, as to that which Coke hath ſaid, That the Viſne in this Caſe ſhall come, de corpore Comitatus, the ſame is not ſo, for ſuch a Viſne ſhall never be, but where the iſſue is upon Nul tiel vill hamlet, or place known: In another Caſe the trial ſhall be, de corpore Comitatus, as in a falſe impriſonment the Defendant juſtifies, that the common voice and fame was, that the Plaintiff committed ſuch a Felony, &c. The Plaintiff traverſeth the common voice and fame, there the Viſne ſhall be, de corpore Comitatus, 11 E. 4. 4, and 5. and ſee alſo 25 Eliz. the Caſe of Gynne and Conſtantine reported now in Coke, 6. part Dowdale's Caſe, 48. As to the defect in the verdict for the half year, the Record is not ſo; for the Record is, dimidio anni decimi, & undecimi, and ſo two half years make a whole year, and ſo there is but ſeven years in which the diſturbance is ſuppoſed to be done. See as to the Viſne, de corpore Comitatus, 22 E. 4. 4 Viſne 27. Another Exception was taken, becauſe that the Declaration is, That the Leaſe was made at Durham, in Comitatu Dunelm. and doth not ſay alſo in Selberg, for ſuch is the name of the County Palatine; but to that it was ſaid, That every Writ of Execution which goes into the County Palatine, is directed Epiſcopo Dunelmenſi, & Cancellario ſuo, quod det in mandatis Vice-com. ſuo, &c. And Durham was called Selberg in ancient times, and the name of the County Palatine there, is commonly Dunelm. & Selberg. and their pleas there entred; Placita coram Juſticiariis de Dunelm. & Selberg. but the ſame is amongſt themſelves onely, and all directions from hence to them are Epiſcop. Dunelm. without mention of Selberg, and a Precedent was ſhewed to the Court to that purpoſe and intent. Manwood, Levied by diſtreſs, and iſſint rein arere ſhall be tried where the Leaſe was made: Clark, That is true, for by the (Iſſint) the plea before is waved: And ſee 8 H. 5. 10. Where an iſſue is to be tried in Lincoln, or ſuch a Town, which is a Franchiſe, the Ven. fac. ſhall be of Lincoln, &c. and not de vicineto de Lincoln; for then the Jury ſhall be as well of the County adjacent, as of Lincoln it ſelf, which the Sheriff of Lincoln cannot doe: but a Venire facias de ſuburbiis of Briſtow was awarded good:

And

And if in the caſe at Bar, the defendant had pleaded, that the Defendant had entred into part of the Mines, and ſo ſuſpended his Rent, upon which they are at iſſue; that, by Manwood, ſhall be tried by a Jury, de corpore Comitatus. The iſſue here is, If the Defendant might enjoy thoſe Mines, Secundum veram intentionem dimiſſionis prædict. and that is referred to the Deviſe which was made at Durham, and there it is well triable. And afterwards, at another day it was holden, That all the iſſues are Jeofailes; but as to the want of place, the ſame was holden to be a material Exception. See the Caſe of Mynes, Plowd. 337. Exception was taken to the Information, becauſe it is not laid down there in what Town or Hamlet Newlands lay; and it was holden, the ſame had been a material Exception, if the Defendant had demurred upon the Information, in which caſe there is no trial by Jury, &c. and he ſaid, Miſnoſmer ſhall be tried where the Writ is brought, &c. So Ne unque adminiſter as Executor, &c. Manwood, Here the Leaſe is ſaid to be made at Durham, in a place certain; if now there be not any other local thing ſaid which might draw the trial elſewhere, it ſhall be tried at Durham where the Leaſe is made: An Infant makes a leaſe for years, rendring Rent, and afterwards re-enters, and avoids his Leaſe by reaſon of his nonage, and Title is made againſt him by the Leaſe, upon which he pretended nonage, it ſhall be tried where the Leaſe was made, and afterwards Judgment was given for the Plaintiff.

*Paſch.* 30 *Eliz.* In the King's-Bench.

## XXIX. Roſs *and* Morrice's *Caſe*.

EDward Roſs was Plaintiff in a Replevin againſt Edward Morrice, and George Manly Defendants, who made Conuſance, as Bailiffs to Jerom Weſton. The Plaintiff declares, of the taking of two Geldings, 20 Decemb. 29 Eliz. at Nayland, in the County of Suffolk, in a certain place called Nayland-Court-Meadow. And the Conuſance is that the place where was a Freehold of the ſaid Jer. Weſton, &c. The Plaintiff in bar of the Conuſance ſhewed, That long time before, Sir Chriſtopher Danby was ſeiſed of 30 acres of Meadow in Nayland, whereof the place where, &c. and Leaſed the ſame by Indenture to Thomas Calton, 19 Maii, 31 H. 8. Habendum from the Feaſt of the Annunciation, 1553. for the term of 45 years; Who, 1 E. 6. aſſigned his Intereſt to Edw. Roſs, the Plaintiff's Father, who, 1 Maii, the ſaid 1553. entred, and 11 Eliz. granted his Intereſt to Bamford and Maſcal, who entred and were poſſeſſed. Sir Chriſtopher Danby died ſeiſed of the Reverſion, 13 Eliz. and the ſame deſcended to Thomas Danby his ſon and heir: 14 Eliz. Maſcal died, Bamford, 15 Eliz. granted to the Plaintiff, Habendum from the 17 of March 1583. for three years, which expired 26 Eliz. Bamford entred, and afterwards Thomas Danby granted the Reverſion to Edw. Rockwood in Fee, to which the ſaid Bamford Attorned; and the Plaintiff by force of the ſaid Leaſe, , put in his Cattel, &c. The Plaintiff Replicando ſaid; That long time before that Danby had any thing, Jeofry, Lord Scroop, had iſſue of his body, Henry, Lord Scroop, and died; And that one John Guntwarby was ſeiſed of the ſaid Manor of Nayland, whereof, &c. in Fee, by his Charter, 25 E. 3. gave to the ſaid Henry, Lord Scroop, the ſame, Et hæredibus corpore ſuo exeuntibus, who had iſſue Stephen, who entred, and died ſeiſed, having iſſue John, who entred, and died ſeiſed, having iſſue Thomas, who entred, and 3 H. 7. ſuffered a Common Recovery to the uſe of himſelf and his heirs, The Recoverers enfeoffed, Thomas ſeiſed alſo of many other Lands, and had iſſue, Ralph, Jeofry, Alice, Elizabeth and Margery, and afterwards died ſeiſed. Ralph Lord Scroop entred, and thereof did enfeoff divers perſons unto

1 Cro. 108, 109.

unto the uſe of himſelf, and Eleanor his wife, for their lives, and the heirs males of the ſaid Ralph; and afterwards, the ſaid Ralph being poſſeſſed of the ſaid Charter of entail made, ut ſupra, by Guntwardy, 7 H. 8. Deviſed that the Feoffees ſhould be ſeiſed of the ſaid Manor of Nayland to the uſe of himſelf, and Eleanor his wife, for their lives; and if they died without iſſue of the body of the ſaid Ralph, the ſaid Jeofry then living, that then the Feoffees ſhould be ſeiſed to the uſe of the ſaid Jeofry, (being his Uncle) for his life, and after his deceaſe, ad uſum Rectorum hæredum in perpetuum ſecundum antiquam Evidentiam inde ante factam; with an averment, that the ſaid Ralph, at the time of the ſaid Deviſe, and of his death, was poſſeſſed of the Charter of Entail made by the ſaid Guntwardy: and that the ſaid Charter was the moſt ancient Evidence of the ſaid, concerning the ſaid Manor. Ralph died without iſſue poſſeſſed of the ſaid Charter by which the Feoffees were ſeiſed of the ſaid Manor of Nayland to his uſe for life, and after to the uſe of the ſaid Jeofry for life, and after his deceaſe, of the right heirs of the body of Henry, Lord Scroop, lawfully begotten, by reaſon of the ſaid Deviſe, and the ſaid Charter, and of the reſidue of the Manors, to the uſe of the ſaid Jeofry and his heirs; Eleanor died, after whoſe deceaſe, the Feoffees were ſeiſed of the ſaid Manor of Nayland, to the uſe of the ſaid Jeofry, right heir of the ſaid Henry, Lord Scroop, of his body begotten, and of the other lands to the uſe of the ſaid Jeofry in Fee: Jeofry died without iſſue, by which the Feoffees were ſeiſed to the uſe of the ſaid, Alice, Elizabeth and Margery, Coſins and heirs of the body of the ſaid Henry Scroop, &c. And of the heirs of the bodies of the ſaid Alice, Elizabeth and Margery, lawfully begotten, by reaſon of the ſaid Deviſe and Charter, as to the ſaid Manor of Nayland, and of the other Manors to their uſe in Fee: And afterwards the ſaid Alice took to husband, James Strangways, who had iſſue, Thomas: Elizabeth took to husband, Fitz Randolph, who had iſſue Elizabeth, Dorothy, Agnes, Alice: Margery took to husband, Danby, who had iſſue, Sir Chriſtopher Danby, named in the Bar, and afterwards all the ſaid husbands and their wives died, by force of which the ſaid Feoffees were ſeiſed of one part of the ſaid Manor of Nayland in three parts to be divided, to the uſe of the ſaid Thomas Strangways; and of another part, to the uſe of the four daughters of the ſaid Elizabeth, and her husband Fitz Randolph, and of another ſuch part to the uſe of the ſaid Chriſtopher Danby, and of their heirs in Tail; and of the other lands to the uſe of them in Fee, in degree of Coparcinary; Elizabeth, the eldeſt daughter of Fitz Randolph, took to husband Shirley; Dorothy her ſiſter took to husband, Eſhe: Agnes took to husband, Maynel, and Alice took to husband Draufield. Thomas Strangways had iſſue, James, and died. And afterwards partition was made, by which, to James Strangways were allotted lands in Kent, and agreed that the Feoffees ſhould be ſeiſed of the ſaid lands to the uſe of the ſaid James and his heirs, and to no other uſe. To Sherley, and Elizabeth his wife, lands in Eſſex were allotted and agreed upon the partition, that the Feoffees ſhould be ſeiſed to the uſe of them, &c. in Fee, &c. And to Danby the ſaid Manor of Nayland, in tail, by reaſon of the Deviſe and Charter, aforeſaid, as to the ſaid Manor of Nayland, and of other lands in Fee. And afterwards, 23 E. 8. notice was given to the Feoffees of the ſaid partition, and averred that the partition was equal, &c. and that the Feoffees were ſeiſed to the uſe of the ſaid partition, untill 27 H. 8. and confeſſed the Leaſe made by Danby to Calton, and all the aſſignments ſet forth in the Bar to the Avowry, and farther ſhewed, That Thomas Danby entred upon Roſs the Plaintiff, and enfeoffed Rockwood, who enfeoffed Weſton.

Coke. for the Plaintiff, The Caſe is no more; but where a man hath iſſue, a ſon and a daughter by ſeveral women, and Deviſeth his Lands to his ſon, and the heirs of the body of the Father lawfully begotten, in

which

which caſe, if the Son dieth without iſſue, the Tail is extinct, and the Daughter ſhall never have the Land, for ſhe doth not take by way of Reverſion or Remainder, and ſhe doth not take in poſſeſſion, becauſe the poſſeſſion was in Jeofry who was the Heir of Henry, &c. And theſe Caſes were vouched; 1 Roberge's Caſe, 2 E. 3. 1. to Tail: John Mandevile took to Wife Roberge, and Mandevile gave land to Roberge, & hæredibus ipſius Johannis quos ipſe de corpore prædict. Robergiæ procreaverit; there the Book is, That the Formedon was, Quæ M. dedit Robergiæ & hæredibus dict. Johannis quos ipſæ de corpore dictæ Robergiæ procreaverit; Et quæ poſt mortem præfat. Robergiæ, & R. filii & hæredis dict. Johannis Mandevile, & hæredis ipſius Johannis de corpore dicto Robergiæ per dict. Johannem procreat. &c. and the ſame Writ awarded good, which Coke denyed to be Law. And he cited the Caſe of Dyer, 4 and 5 P. and Ma. 156. A. gives Lands to one for life, the Remainder thereof rectis hæredibus maſculis de corpore dict. A. legitime procreat. remanere inde rectis hæredibus dict. A. who hath iſſue two Sons, and dieth; A. dieth, the eldeſt Son hath iſſue a Daughter, and dieth without iſſue male: And he conceived firſt, That in this caſe the limitation of the Remainder in Tail to the right Heirs of the body of the Donor is void, for the Donor cannot make his own right Heir a Purchaſor, without departing with the Fee-ſimple of his perſon: But admitting the limitation is good, he ſaid we are to conſider, If this entail to the Son, once veſted and commenced in the poſſeſſion of the Son, when he dieth without iſſue male, The Eſtate be ſpent, or that the ſame ſhall go to the younger Son? And he ſaid, that it was the opinion of Dyer in that caſe, That the younger Son was inheritable to the ſaid Eſtate-tail: as in the Caſe of Littleton 82. where the condition is, That the Feoffee ſhall give the Lands to the Son and Heir of the Huſband and Wife, and to the Heirs of the body of the Father and Mother lawfully begotten: and the Huſband and Wife before any ſuch Gift die, having iſſue, and afterwards the Feoffee gives the Land to the Son and Heir of the Huſband and Wife, and to the Heirs of the body of the Father and Mother begotten, the condition is well performed: and if the eldeſt Son, to whom the Gift is made, dieth without iſſue, the youngeſt Son ſhall inherit: And in a Formedon in the Reverter, upon ſuch a Gift the Writ ſhall be, Et quæ poſt mortem of the eldeſt Son, ad ipſum reverti debet; becauſe the Huſband and Wife obierunt ſine hærede de corpor. ſuis inter eos exeunt. And ſuch was alſo the Opinion of Saunders. But Brook, Brown and Catlin were clear contrary; And he ſaid, that Bendloes Serjeant, who reporteth that Caſe, doth affirm, That Judgment was given in that caſe, That the Eſtate-tail was ſpent, and that the Daughter ſhould have the Lands, and not the ſecond Son: and ſo he ſaid, That in the Caſe at the Bar, the Eſtate-tail was ſpent: But he ſaid, That he conceived that in the principal caſe at Bar there is not any Eſtate-tail at all, becauſe the words (upon which the Eſtate-tail is conceived) are incertain and too general, viz. [ſecundum antiquam Evidentiam,] for there might be many ancient Evidences, for the words may extend to Evidences which cut off the Eſtate tail, as well as to the Entail of Guntwardy. He alſo argued, That the Partition was void; and then the Leſſee had a good intereſt for certain parts of the Lands, for Partition cannot be made of an Uſe: and he ſaid, that he agreed, That Partition betwixt Huſband and Wifes of Lands, if it be equal, ſhould bind the makers, becauſe they are compellable to make Partition of them; but contrary of an Uſe, for that they are not compellable to do: Alſo, in the principal Caſe, the Land entailed is allotted to one of the Coparceners, which is not good but during the Coverture, and afterwards void; and then the Leaſe is void but in part, and ſo the Conuſance is not good.

Atkinſon contrary; and he ſaid, I conceive, that by words of Relation a Fee may paſs without the word Heirs. See 39 Aſſ. 12. The Father ſeiſed of Lands in fee, doth enfeoff his younger Son in fee, and the Father continues the poſſeſſion of the Lands, claiming to hold them at the will of the Son; and the Son coming into the Town where the Lands do lie, in the hearing of his Neighbours ſaith to his Father, You have given to me theſe Lands, naming them; As fully as you have given them to me, I give them back to you again: and the ſame was holden to be a good Gift to the Father: 43 E. 3. 22. The King ſeiſed of a Manor, to which an advowſon is appendant by Eſcheat or Conveyance, gives the ſaid Manor as entirely as ſuch a one held the ſaid Manor before the Eſcheat or Conveyance, the Advowſon ſhall paſs without ſpecial mentioning of it: And ſo here in our Caſe at Bar; This Will hath reference to the ancient Evidence, and it ſhall be as ſtrong as if he had ſet down the ſpecial words of Entail; and to ancient Evidence before the Entail it cannot extend, for then a fee ſhould paſs, and then the Deviſe ſhould be void, becauſe to his Heir; and the word Antiqua Evidentia ſhall have reference to the Charter which was made by Guntwardy, for that was an ancient Evidence made two hundred years paſt: and he cited the Caſe of 40 E. 3. 8. the Provoſt of Beverley's Caſe, and conceived that the Eſtate was not ſpent, for that the Eſtate-tail was in Jeofry, as the fee was in him. Lands are given to the Father for life, the Remainder to the Son in Tail, the Remainder to the right Heirs of the Father; the Father dieth, the Tail and the fee are in the Son; but yet after the death of the Son without iſſue, the Lands ſhall be in the Brother's Son by deſcent, and not as Purchaſor. And in our Caſe, Jeofry was in in the Tail, as right Heir of Henry; and if Jeofry dieth without iſſue, his Brother of the half bloud ſhall have the Lands, as in the Caſe before cited of 40 E. 3. but that ſhall be in Tail by force of the Deviſe. And he ſaid, That in this caſe here, the Partition was made good enough, although it were of Lands in uſe, for a man might contract for an Uſe without Deed: 11 H. 4. Partition 156. Partition of an Advowſon without Deed: and that is by reaſon of the privity betwixt them, and becauſe they are compellable to make Partition: and in our Caſe they are compellable by Subpœna in Chancery to make Partition; and notwithſtanding that the Lands entailed be allotted to one Coparcenor onely, and the fee to the other three, yet thereby the Partition is not void, but voidable: As an Exchange by Tenant in tail is not void, but if the Iſſue in tail accept of it, it ſhall bind him during his life: So here; and alſo by the death of the Husbands the Partition is not void, but voidable onely.

Clench, Juſtice; How ſhall the Heir be ſaid ſeiſed of the Lands entailed, which was allotted to his Father and Mother after acceptance and agreement?

Atkinſon, Of certain part as Iſſue in tail, and of other parts by force of the Partition and acceptance, Quære of that: for if it be not of the whole as Iſſue in tail, then the Leaſe is not void, but for ſo much whereof he was ſeiſed in tail, and then the Leſſee is Tenant in common with Weſton, and then the Conuſance is not good.

Cooper, Serjeant elect; Here wants certainty, for the words of reference are too general, and therefore void, ad uſum rectorum hæredum, without ſhewing of the Donor or of the Donee; and they are not helped by the ſubſequent words, ſecundum antiquam Evidentiam ante hac factam, for that alſo is incertain; for it appeareth upon the Record, That there are divers Evidences of the ſaid Lands, as the Charter of Gift, the Recovery, and the Conveyances made 4 H. 7. and which of them is intended by the Deviſe, non conſtat: and the ſaid defect is not helped by any of the Averments; i. That the Deviſor was poſſeſſed of the

the ſaid Charter of Entail at the time of his death; and it is alſo not to the purpoſe, for it may alſo be, that he was poſſeſſed of other Evidences as ancient as the ſaid Charter of Entail: It is ſaid, that there is no other ancient Evidence of the Lord Scroop, but it is not averred That there was not other ancient Evidences of the ſaid Lands. But admit that the limitation be good by that reference, yet there was not any Eſtate-tail, for every Eſtate-tail ought to be limited in certainty, which ſee in the Statute of Weſt. 2. ſecundum formam in Chatta Doni manifeſto expreſſam, &c. and here it doth not appear upon the words of the Charter, if the Eſtate-tail be limited to the Heirs of the Donor, or unto the Heirs of the Donee? and he ſaid, Admit that the ſame is an Eſtate-tail, then the Queſtion is, If Jeofry be a Purchaſor? and if he be, then by his death without iſſue the Eſtate-tail is ſpent: And he ſaid that the Eſtate for life in Jeofry is drowned by the Eſtate-tail limited to him, for they are united together.

Egerton, Solicitor-General; Reaſonable and favourable conſtruction ought to be made of this Deviſe according to the intent of the Deviſor: As 35 Aſſ. 14. Lands are given to B. and his Heirs, if he hath iſſue of his body; and if he die without iſſue of his body, that the Lands ſhall revert to the Donor and his Heirs, the ſame is a good Entail; and upon the death of the Donee without iſſue, the Donor ſhall re-enter: And ſo here, although that [rectorum hæredum] be incertain words, yet the ſame is ſupplied by the ſubſequent words, viz. ſecundum antiquam evidentiam. As, where the King grants to a Mayor and Commonalty ſuch Liberties as London hath, the ſame is a good Grant: 2 H. 7. 13. And he conceived, That this Eſtate-tail ſhall be ſaid to begin in Henry, although he was dead before, and that all his Iſſues ſhould inherit it, and that it ſhould not be determined by the death of Jeofry without iſſue; and in proof thereof he vouched the Caſe before cited, Littl. 81, 82. for in that caſe the condition could not be holden to be performed, if the Heir to whom the Gift was made in facto ſhould be in by purchaſe, and ſo the Eſtate-tail ſpent by his death without iſſue: and alſo he vouched the Caſe of one Shelley, That although the Heir took that which was not ever in his Anceſtors, yet he did not take it as a Purchaſor, but as in courſe of a deſcent; and he alſo cited Robridge's Caſe. And afterwards, the ſame Term, by award of the Court, Judgment was entred for the Plaintiff, for the incertainty of theſe words [ſecundum antiquam Evidentiam] to what Evidence it ſhould refer; and alſo [rectorum hæredum] without ſhewing whoſe Heirs, i. of the Donor, or of the Donee. And Wray, chief Juſtice, ſaid, It ſhall be intended upon this Will, That the meaning of the Teſtator was, That the Lands ſhould go unto his Heirs according to the Law, according to all his Evidences which he had of his Lands, and that is a Fee ſimple; and it ſhall not be intended, That the Teſtator had ſuch a ſpecial remembrance of one Deed made two hundred years before, viz. 25 E. 3. 1 Leo. 245.

*Mich.* 30 *Eliz.* In the King's-Bench. *Rot.* 482.

## XXX. Perry *and* Some's *Caſe.*

SOme, Parſon of the Church of Sherring in Eſſex, libelled in the Spiritual Court againſt Perry, for the Tithes of green Tares, eaten before they were ripe, and for the Tithes of the Herbage of dry Cattel, and for Tithes of Sheep bought and ſold, and for Churchings and Burials; Perry prayed a Prohibition, and in his ſurmiſe; as to the green Tares, he ſaid, That they had uſed, time out of mind, &c. in the ſame Pariſh. In conſideration that they had not ſufficient Meadow and Paſture for their milch Kine, and draught Cattel to pay for 1 Cro. 139.

the Tithes of the ripe Tares, the tenth ſhock; but for their green Tares which are eaten up before they are ripe, in conſideration that they gave them to their Cattel, they had uſed to be diſcharged of any Tithes thereof; and the truth was, That 400 Acres of Lands within the ſaid Town had uſed to be plowed and ſowed every year by the labour of draught Cattel, and induſtry of the Inhabitants, in conſideration of which, and that in the ſaid Pariſh there was not ſufficient Meadow nor Paſture for their draught Cattel, they had uſed to be diſcharged of the Tithes of green Tares eaten before they were ripe: It was holden by the Court, that the ſame was a good cuſtome and conſideration, for the Parſon hath benefit thereby, for otherwiſe the ſaid 400 Acres could not be plowed; for without ſuch ſhift to eat with their draught Cattel the green Tares, they could not maintain their plough Cattel, and ſo the Parſon ſhould loſe his Tithes thereof; and for the Tithes of the green Tares, he hath the Tithes of 400 Acres. There was a Caſe lately betwixt the Lord Howard and Nichols, where the ſuit in the Spiritual Court was for the Tithes of Rakings, and a ſurmiſe to have a Prohibition was made, that the Inhabitants had uſed to till and ſowe their Lands, &c. and they had uſed to be diſcharged of their Tithes of rakings after that the ſhocks were carried away. And Coke, who was of Counſel with the Parſon, durſt not demurr upon it, but traverſed the Preſcription. Wray, Chief Juſtice, The want of Meadow and Paſture in the Pariſh, is the great matter here, and there is not any miſchief here, as if they had ſurmiſed, that for want of Meadow and Paſture, they had eaten their Meadows with their Cattel; And it was held by the whole Court, that it was a good Preſcription.

*Trin.* 30 *Eliz.* In the King's-Bench.

## XXXI. The Queen *and* Partridge's *Caſe.*

1 Cro. 135. IN a Quo Warranto, brought againſt Partridge, It was holden by all the Juſtices; That a man might preſcribe to hold a Leet oftner than twice in a year, and at other days than are ſet forth in the Statute of Magna Charta, Cap. 35. becauſe the ſaid Statute is in the affirmative: But Popham, Attorney General ſaid, That one cannot preſcribe againſt a Statute. And it was moved by him; If a general Pardon be granted with general Exception in it, he which will have advantage of it, ought to plead it, and ſhew that he is not any perſon excepted, for otherwiſe the Judges cannot allow him the benefit of it, becauſe they do not know if he be a perſon excepted or not; But if there be ſpecial perſons excepted by name, and no others excepted, but ſo many perſons, there he need not to plead it; for the Court may diſcern J. D. from J. S. 8 E. 4. 7. vide 26 H. 8. 7. If a man commits Felony, and alſo Treaſon, and afterwards comes a general pardon for Felony, but Treaſon is excepted, and the party is arraigned for Felony: By Coke he ſhall have the benefit of the pardon; Popham, contrary, For he is diſabled by the Treaſon: See Coke's Caſe, 13 Eliz. Plowd. 401. he pleaded to the Felony, the general pardon by Act of Parliament, and added, that neither himſelf, nor the ſaid offence was excepted: And it was agreed by the whole Court, That in a Quo Warranto, it is not ſufficient for the Defendant to ſay, That ſuch a Subject hath lawfull intereſt to hold Leets without making title to himſelf; for the Writ is, Quo Warranto he claims them. And afterwards Judgment was given for the Queen.

*Trin.*

*Trin.* 30 *Eliz.* In the King's-Bench.

## XXXII. Woodward *and* Bugg's *Caſe*.

WOodward libelled in the Spiritual Court againſt Bugg and Nelſon for Tithes of certain Lands, called Chriſtian-Hill; The Defendant ſued a Prohibition, and ſurmiſed, That one Prettiman was ſeiſed of the ſaid Land, and in conſideration of 5 l. by him paid to the ſaid Parſon, it was agreed betwixt them, That the ſaid Prettiman and his aſſigns ſhould be diſcharged of the Tithes of the ſaid Lands during his life, And afterwards the ſaid Prettiman leaſed the ſame to the Defendants, upon which a Prohibition was granted; and it was holden that the party need not to make proof thereof within ſix months, for it is not within the Statute, becauſe a compoſition with the Parſon: But now a conſultation was granted in the ſame Cauſe, becauſe the agreement is ſhewed, but no need of it, the which cannot be any diſcharge; but if it had been for a time, i. Unica vice, it had been good, but contrary, being for life: Alſo there is not any expreſs Grant of Tithes, but onely a Covenant, and agreement that he ſhould be diſcharged, upon which he may have an Action, but no Prohibition: It was ſaid on the other ſide, That although without Deed Tithes cannot paſs in point of intereſt, yet by way of diſcharge they well may. Coke, It was holden betwixt Pendleton and Green, That upon ſuch words of Covenant and agreement, the party ſhould hold the Lands diſcharged of Tithes, which was denied: For if the Grantee of a Rent-charge will grant it to the Lands without Deed, it is not good; And there was of late a Caſe betwixt Weſtbed and Pepper, where it was agreed betwixt the Parſon and one of his Pariſh, that for twenty ſhillings Rent per ann. the Pariſhioner ſhould be diſcharged of Tithes for twenty years, if he lived ſo long; and it was holden that no Prohibition did lie thereupon, a Fortiori where the Eſtate is for life: Gawdy, In a Caſe of grant of Tithes for life, a Deed is requiſite, but here it is but a Covenant for money: See 21 H. 6. 43. Wray, If it had been for years, it had been good, but here it is not any Contract, but onely a diſcharge for life, which cannot be during his life, without Deed; And afterwards the Record was read, which was Concordatum & agreatum fuit between the two parties, pro omnibus decimis, during the time that one ſhould be Parſon, and the other occupier of the ſaid Lands, that in conſideration of 5 l. the ſaid Prettiman and his aſſigns, ſhould hold the ſaid Lands diſcharged of Tithes; Wray, The ſame is not a Contract, but Promiſe; for he doth not grant any Tithes, &c. 1 Cro. 188. Owen Rep. 103. 2 Roll. 63. 3 Len. 257.

*Paſch.* 32 *Eliz.* In the King's-Bench.

## XXXIII. Devered *and* Ratcliff's *Caſe*.

IN Debt, the Plaintiff declared, That he himſelf had brought an Action in London againſt one A. and had Judgment to remove; and a Capias was awarded and iſſued forth, to take the ſaid A. in execution upon which, Non eſt inventus was returned; upon which one of the ſureties of A. being in Priſon in London, under the cuſtody of the Defendant, upon a Plaint againſt him, was detained in Priſon for the ſaid Debt ſo recovered againſt A. Secundum conſuetudinem Civitatis prædict. prout per record. ejuſdem Curiæ apparet, and after the Defendant ſuffered the ſurety to eſcape; upon which there was a demurr; The matter was, If the ſaid ſurety was a Priſoner in Law for the ſaid 1 Cro. 185.

ſaid Debt, as ſurety of A. for in the Declaration it is not expreſly laid, that there was ſuch a cuſtom in London, ut ſupra, but onely, Secundum conſuetudinem, &c. And ſecondly, there were two ſureties of A. and the one of them onely is detained in execution: Alſo the cuſtome, as it is here laid, is not reaſonable; For a Scire facias ought to iſſue out againſt the ſureties, and they ought not to be taken or detained in execution preſently; For the condition of the Recognizance of ſureties is, That they bring in the Defendant, if he be condemned, or to pay the Debt; and now by this cuſtome, the party who is ſurety being taken, cannot plead the releaſe of the Plaintiff, or the death of the Defendant in his diſcharge, as he might upon a Scire facias, which was agreed per Curiam; and adjudged accordingly.

*Trin.* 30 *Eliz.* In the King's-Bench.

## XXXIV. Clark *and* Green's *Caſe.*

AN Action upon the Caſe was brought for theſe words: He liveth by Charming, Sorcery and Witchcraft; It was moved, that the words were not actionable; for the words might be conſtrued, as if the life of the party were preſerved by that means. And it was holden, 30 Eliz. in the Caſe betwixt Smith and Morrice, that the word Witch is not actionable; And therefore, if a man be ſued in the Spiritual Court for defamation, for calling one Witch, a Prohibition doth not lie. It hath been holden, that upon theſe words, He went to deſtroy a child in a woman's belly, were actionable, and yet it is not Felony, but a great diſcredit; and theſe words, Thou uſeſt Witchcraft, are not actionable. And afterwards, in the principal Caſe, Judgment was given, Quod nihil capiat per Billam. And by Gawdy, It might be that the Plaintiff had the forfeiture of thoſe who are convicted of offences, and ſo liveth thereby.

*Trin.* 30 *Eliz.* In the King's-Bench.

## XXXV. Harford *and* Gardiner's *Caſe.*

IN an Action upon the Caſe, The Plaintiff declared, that the Defendant in conſideration that the Father of the Plaintiff had imployed his ſervice about the buſineſs of the Teſtator of the Defendant, to the great profit of the Teſtator; and in conſideration of love and affection that the Teſtator bore to the Plaintiff, promiſed to give unto him 100 l. Curia, Love is not a conſideration, upon which an Action can be grounded; the like of friendſhip: Wray, If the Plaintiff declares, That the Defendant in conſideration that he was indebted unto the Plaintiff in divers ſumms of money, and promiſed to pay him 100 l. it is not good for the incertainty: Alſo the conſideration here, was paſt and executed before the promiſe made, and nothing is done by the Son. And afterwards Judgment was given againſt the Plaintiff.

3 Cro. 756. 1 Len. 94.

*Mich.* 31 *Eliz.* In the Exchequer.

## XXXVI. Clark's *Caſe.*

Poſt. 89. BRidget Clark was indebted to Archdell by Obligation, and afterwards ſhe delivered to one Andrews certain Hogſheads of Wine to ſatisfie the ſaid Archdell de debito prædicto: afterwards the Obligation of

Clark

Clark was assigned to the Queen for the Debt of Archdel: and if the property of the said Hogsheads of Wine were altered by the delivery of them to Andrews before the assignment? was the question.

Egerton, Solicitor General; The property is not altred; for the Bailor might have an Action of Account against Andrews before he hath delivered them over according to the Bailment; but if he hath delivered them over, the same is a good bar in Account: But if one be accountable to me upon a Bailment, and afterwards I require him to bail the goods over to A. the same is not in bar of the Account, but is a good Plea in discharge of Account before Auditors, for that is matter after the Bailment, not upon the Bailment. If Goods be bailed to bail over upon a consideration precedent on the part of him to whom they ought to be bailed, the Bailor cannot countermand it, otherwise it is where it is voluntary and without consideration, but where it is in consideration of a Debt not countermandable; contrary, if to satisfie the Debt of another.

Manwood, chief Baron: Where the Debtor of the King is sufficient, there a Debt due to him ought not to be assigned to the King, but onely where the Debt is doubtfull, and that was the ancient course: but now at this day many seem and are accounted to be rich who are not, and therefore omnis ratio tentanda est to recover the Debts of the King. But as to the Case before us, Briget is Executrix to her Husband, who was indebted to Archdel, and she delivered the Goods to Andrews to satisfie Archdel, and all that before the Assignment. And I conceive that the property of the said Goods is altered; for, as the case is here, Andrews was Surety for Clark, and had a Counter-Bond of Clark to save him harmless. If I borrow Money, and deliver Plate for the security of it, the general property is in me, yet the Bailee hath a special interest in it, till the Money is paid. If Goods be delivered to A. to pay to B. A. may sell them. An Executor hath Goods of the Testator, and he with his own Monies pays the Debts of the Testator, he shall retain the Goods, and the property is altered. And here in our Case, Andrews might by virtue of the Bailment sell the Goods, and with the Money pay the said Archdel. And afterwards Judgment was given, That the property of the Goods was altered.

31 *Eliz.* In the Exchequer.

## XXXVII. Norris *Case.*

IN an Information upon Intrusion against Norris and others concerning Folly John Park, the Defendants pleaded in Bar a descent: It was holden clearly by the Court, That against the Queen a Descent is no Plea, nor any Title against the Queen, because nullum tempus occurrit Regi: neither shall Laches be imputed to her: for the possessions of the Queen are large, and it is not reason that she should be bound or tyed to look to her affairs concerning her possessions, or to incur any damage in default thereof; for she is to intend and manage the publick affairs of the Kingdom and State. It was also held by the Court, That in pleading of a Lease for life, or Feoffment, the party needs not to shew the place where the Lease or Feoffment was made.

Popham, the Queens Attorny, took Exception to the Bar to the Information, That whereas in the Information Title is made to the Queen, and concludes, prout patet per plurima Recorda & memoranda Scaccarii; the Defendants have not Traversed it by saying, Absque hoc quod habetur aliquod tale Recordum, To which it was said by Harris and Savil, Serjeants, That if a special Record had been alledged in certaint-

tainty, then we ought to have taken ſuch Traverſe; but here it being in the generalty, we ought not to traverſe at all. Manwood, Becauſe the Information is general, i. ut patet per plurima Recorda, ſo the Traverſe ought to be alſo.

Another Exception was taken to the Bar, becauſe in the Information the Title of the Queen is ſet forth: and the Defendants plead, That long before the Intruſion A. was ſeiſed in Fee, and enfeoffed B. who died ſeiſed, &c. where it might be that the Title of A. was mean betwixt the Title of the Queen and the Intruſion: whereas by Manwood and Popham they ought to have ſaid, Diu antequam the Queen was ſeiſed, A. was ſeiſed, &c. Savil and Harris, If which ſhould ſo plead, we ſhould confeſs that the Queen once had a Title, and that is not true, which Manwood denied, for by ſuch Plea nothing is confeſſed. And it was ſaid by ſome, That where in the Bar the Title of the Queen is confeſſed and avoided, there the Defendant ſhall ſay, Diu antequam the Queen had any thing, &c. otherwiſe not. And it was holden by all, That in ſuch caſe, a Feoffment might be an induction unto a Traverſe, but not a Deſcent. And by Manwood, it is a general Rule, as well in the caſe of a Subject, as in the caſe of the Queen, That nothing can be an Inducement to a Traverſe, but ſuch a thing as is Traverſable; and here the Deſcent induceth the Traverſe, being not Traverſable in this caſe. Alſo it was holden, That the place where the party dieth ſeiſed needs not to be ſhewed in pleading a Deſcent. And afterwards Manwood at another day, mutata opinione, conceived, That as to plurima Recorda, there needed no Traverſe, although there were many preſidents to the contrary: Diu ante tranſgreſſionem fieri ſup. is a good Plea in Treſpaſs in Caſe of a common perſon, not in the King's Caſe, diu ante Intruſionem, &c.

31 *Eliz.* In the Exchequer Chamber.

## XXXVIII. Robinſon *and* Robinſon's *Caſe*.

IN the Caſe betwixt Robinſon and Robinſon in the Exchequer-Chamber by Engliſh Bill concerning the Manor of Draiton Baſſet; The Defendant pleaded in Bar a ſpecial Plea, to which the Plaintiff replyed; and afterwards the Defendant, when he ſhould have Rejoyned, would have relinquiſhed his ſpecial Plea, and pleaded the general Iſſue.

Manwood, In the Common Pleas, and King's Bench, and in the Court of Common Pleas in the Exchequer, before the Iſſue joyned, the Defendant might relinquiſh his ſpecial Plea, and plead the general Iſſue, for the Pleadings there are in paper until Iſſue be joyned, and therefore at any time before Iſſue joyned, the Plea might be withdrawn: But in the Chancery, Court of Requeſts, and here, all Pleas put in are in Parchment, and filed; and therefore it cannot be ſo done: and therefore here, if the Plea be once ingroſſed into Parchment and filed, the Defendant cannot relinquiſh his Plea, and plead the general Iſſue; contrary, where the Plea is yet in Paper.

Gent, Baron, That if upon the Plea in Paper an Iſſue be offered with an Abſque hoc, &c. the other party cannot relinquiſh it, although it be but in Paper. But afterwards the Barons asked the Clarks, what was their courſe in ſuch caſes? who anſwered, That if the Plea be in Parchment, and upon the File, it ſhall never afterwards be taken from off the File, but with the conſent of the parties, and Order of the Court. And afterwards Manwood, with the aſſent of the reſt of the Barons, gave a Rule, That the Defendant ſhould rejoyn to the Replication, or otherwiſe a Nihil dicit to be entred.

31 *Eliz.* In the Exchequer.

## XXXIX. *The Lord* Cromwel's *Case.*

IN the Case of the Lord Cromwel upon the Statute of 33 H. 8. for levying of the King's Debts: A Debt came to the Queen by Attainder of the Creditor, upon which an Extent issued against one of the Ter-tenants liable to the Debt, and not against all: It was moved, That upon a branch of the said Statute, all the Ter-tenants ought to be charged: But it was the Opinion of divers, that such a Debt which cometh to the King by Attainder, is not within the said Statute; for although the Attainder is by a Judgment, yet Debt by Judgment it cannot properly be said, but where a Debt is recovered by Judgment. And that was the Case of the Lord Norris, for a Debt due to Heron by the Lord Williams, which Heron was attainted.

*Hill.* 29 *Eliz. Rot.* 631. in the Common Pleas.

## XL. Machel *and* Dunton's *Case.*

IN Ejectione Firmæ the Case was, That one Machel, Alderman of London, was seised and Leased for years, with clause of re-entry for non payment of Rent; and in the Indenture of Lease there were divers Covenants on the parts of the Lessee: And afterwards the said Machel by his Will willed, That the Lessee should retain the Land demised for thirty one years, reckoning the years of the first term not expired as parcel of the said term of thirty one years, yielding like Rent, and under such Covenants as the Lessee held the former Lease; and by the same Will devised the Inheritance over to a stranger. It was first moved, If here the Lessee for years had a new interest accrued to him by the Will? If it shall vest in him as an interest by it self, or that both Estates, as well the former Lease, as the Estate for years devised by the Will, should be united by way of Surrender? Another matter was because that the Devise is yielding such Rent, and under such Covenants, &c. Now because the meaning of the Devisor was, That the Devisee should hold over the Land for the term encreased as he held before; if here the Law shall give construction to this Devise as near the intention of the Devisor as it may be? and so construe the words of the Will to amount to a condition. But by the Opinion of the whole Court, the words of the Devise cannot make a Condition; for a Condition is a thing odious in Law, which shall not be created without sufficient words. Another matter was moved, If the Fee-simple should pass by this Devise in point of Reversion, or Remainder? And by the better opinion of the Court, it shall pass in point of Reversion; for if it should be a Remainder, then the Rent which is reserved upon the Lease by the Will, shall not be incident to such Remainder, and therefore the Law shall qualifie it into a Fee-simple. Another matter was moved; Admitting that the words of the Devise, ut supra, are Condition, If here in this Case there be a Grantee of the Reversion intended within the Statute of 32 H. 8. As A. seised of Lands in Fee, deviseth them to B. for years, rendering Rent, with clause of Re-entry; and by the same Will deviseth the Reversion to another: If because that it was never in the Devisor a Reversion or a Condition? If

1 Cro. 288. Owen 54, 92. Poph. 8.

the Deviſee be within the ſaid Statute to take advantage of it? And the Opinion of the whole Court was, That the Deviſee of the Fee-ſimple ſhould take advantage of this Condition.

XLI. *Trin.* 29 *Eliz.* In the Common Pleas. *Poſtea* 210.

A Juſticies iſſued forth to the Sheriff of H. for the Debt of 40l. and the ſame Plea was held and determined before the Under-Sheriff in the abſence of the Sheriff: It was moved by Puckering, Serjeant, If a Writ of Error or a falſe Judgment lieth in this Caſe? And it was reſolved by the Juſtices, That the Sheriff himſelf in his perſon ought to hold Plea of a Juſticies; and if he make a Precept or Deputation to another, it is meerly void: 34 H. 6. 48. See the Caſe there abridged, Fitz. Bar. 161. And a Juſticies is not an Original Writ, but a Commiſſion to the Sheriff to hold Plea above 40s. And upon a Judgment given upon a Juſticies, a Writ of falſe Judgment lieth, and not a Writ of Error. See 7 E. 4. 23. And it was the Opinion of the Lord Anderſon, That the Judgment given in the principal Caſe was utterly void, & coram non Judice.

*Trin.* 29 *Eliz.* In the Exchequer.

XLII. *The* Queen *and* Jordan's *Caſe.*

11 Co. 89, 90, &c.

AN Information was exhibited in the Exchequer for the Queen againſt the Executors of William Jordan, Surveyor of the Ordinance, &c. and the Executors of John Bowland, Deputy of Ambroſe Earl of Warwick, Maſter of the Ordinance, &c. In which was ſet forth for the Queen, That certain Powder, Pellets, and other furniture of War, came unto the hands of the ſaid Jordan and Bowland, in reſpect of their ſaid Offices, to the value of 400000 l. and ſhewed how much came to each of them, and the ſpecial charge incertain, per quod onerabiles & computabiles Dominæ Reginæ devenerunt, nec tamen computum unquam inde reddiderunt, nec reddere voluerant, ſed bona & catalla prædicta ad uſus ſuos proprios converterunt, in deceptionem dictæ Dominæ Reginæ, &c. The Defendants pleaded Not guilty, upon which the Queen's Attorny did demur in Law, becauſe the Defendants have anſwered onely to the Converſion: in which caſe although they have not converted, yet if the ſaid Goods have come to the hands of their Teſtator, it is ſufficient for the Queen, and the Defendants are chargeable to the Queen for the ſame: And the Opinion of all the Barons was clear, that the Defendants ought to anſwer to the Charge, &c.

*Paſc.* 29 *Eliz.* In the Common Pleas.

XLIII. Collet *and the Bailiffs of* Shrewsbury's *Caſe.*

IN a falſe Impriſonment, the Defendants juſtified by Preſcription, ſcil. that they have uſed, if any perſon within their Town contemptuoſe ſe geſſerit againſt the Bailiffs of the ſaid Town, or any Warden of any Trade there, to commit ſuch a perſon to Priſon for the ſpace of a day or more at the leaſt, at their diſcretions: And ſhewed farther. That the Plaintiff did miſ-behave himſelf, tam factis quam verbis, againſt the Wardens of ſuch a Myſtery in the ſaid Town

Town, &c. And when the Bailiffs, ſuper Querimoniam eis inde factam, ſent for the Plaintiff, he would not come to them, but miſ-behaved himſelf againſt them, tam dictis quam factis; for which they did commit him to Priſon, &c. upon which there was a Demurrer. And afterwards Judgment was given for the Plaintiff, becauſe their Preſcription is not good; for it is too large to impriſon Subjects at their diſcretion: Alſo they have ſet forth the offence of the Plaintiff generally; i. His behaviour, tam factis quam dictis, without alledging any ſpecial Miſdemeanor in certain.

XLIV. *Paſch.* 29 *Eliz.* In the Common-Pleas. 3 *Leo.* 79.

IT was holden by the whole Court, That where a man makes his Will in this manner, I will and bequeath my Land to A. and the name of the Deviſor is not in the whole Will, yet the Deviſe is good, by averment of the name of the Deviſor, and by proof that it was his Will. And if one lying ſick in extremis, having an intent to deviſe his Land, by word makes ſuch a Deviſe, but doth not command the ſame to be put in writing, but another without his knowledge or command puts the ſame in writing in the life of the Deviſor, it is a good Deviſe, for it is ſufficient if the Deviſe be reduced in writing during the life of the Deviſor. 1 Cro. 100. 1 Leo. 113.

*Trin.* 27 *Eliz.* In the Common-Pleas.

XLV. Leonard Lovelace's *Caſe.*

IN Waſte, the Caſe was, That Lands were deviſed to the Father of the Defendant, and to his eldeſt Iſſue male, de corpore ſuo exeunti: And upon Demurrer it was adjudged, That by this Deviſe no Eſtate paſſed but an Eſtate for life unto the Father of the Defendant, the Remainder to his eldeſt Son for life, ſo as no Eſtate of Inheritance paſſed thereby; and therefore puniſhable for Waſte. 1 Anderſ. 132. More Rep. 371. Savile Rep. 75. 1 Cro. 40.

*Hill.* 33 *Eliz.* In the Common-Pleas.

XLVI. Cobb *and* Prior's *Caſe.* Poſtea 48.

THE Caſe was, A man deviſeth his Lands to his Wife during the minority of his Son, upon condition, That ſhe ſhall not doe Waſte during the minority of her ſaid Son, and dieth: The Wife takes a Husband, and dieth; the Husband commits Waſte: It was holden by the whole Court, That the ſame is not any breach of the Condition.

*Mich.* 30 and 31 *Eliz.* In the Common-Pleas.

## XLVII. Salway *and* Luſon's *Caſe.*

1 Leon. 169. MAtthew Salway brought a Writ of Right againſt Luſon, and the Writ was, Meſſuagium, & 200 acr. jampnor. & brueræ, and exception was taken to the Writ, becauſe that jampnor. & brueræ, were coupled together where they ought to be diſtinctly ſevered; and ſo many acr. jampnor. and ſo many acr. brueræ: although it was objected on the part of the Demandant in maintenance of the Writ, That in the Regiſter, fol. 2. the Writ of Right is, Redditu unius libræ Mac. & Obed. i. Mace and Cloves together without diſtinction or ſeverance. And it was ſaid in a Writ of Right, we ought to follow the Regiſter, and therefore a Writ of Right was abated, becauſe the word Pomarium was put in the Writ, for in the Regiſter, there is no ſuch Writ, and the word Gardinum comprehends it, But in other Writs, as Writs of Entry, &c. it is otherwiſe; See the Caſe of the Lord Zouch, 11 Eliz. 353. In a Writ of Entry, Sur Diſſeiſin mille acr. jampnor. & brueræ. But the exception was not allowed: for it may be, that jampnorum & brueræ lie ſo promiſcuouſly, that they cannot be divided: And ſee 16 H. 7. 8. and 9. The reſpect which the Juſtices there had to the Regiſter, ſo as they changed their opinions, conformable to the Regiſter: Another exception was taken to the Writ, becauſe the Demandant demands duas partes cuſtodiæ de Hay in the Foreſt of C. and the opinion of the whole Court was, that the Writ ought to be Officium cuſtodiæ duarum partium de Hay, and not duas partes cuſtodiæ, As Advocatio duarum partium Eccleſiæ, not duas partes advocationis: another exception was, becauſe the Writ was, duas partes, &c. in three to be divided, whereas it ſhould be diviſus, & non dividend. for dividendum is not in any Writ but a Writ of Partition. And by Windham, the parts of this Office are divided in right, Quod Curia Conceſſit, another exception was taken, becauſe in the Writ, it is not ſet down in what Town the Foreſt of C. is, ſo as the Court doth not know from whence the Viſne ſhould come; for no Venire ſhall be de vicineto Foreſtæ, as de vicineto Hundredi & Manerii; and that was holden to be a material exception: Another exception was taken, becauſe a Writ of Right doth not lie of an Office; for at the Common Law, an Office did not lie of it, but now it doth by the Statute of Weſt. 2. For it was not liberum tenementum, but the party grieved was put to his Quod permittat. And of this opinion was the whole Court.

*Hillar.* 31 *Eliz.* In the Common-Pleas.

## XLVIII. Johnſon *and* Bellamy's *Caſe.*

Poſtea 82, 83. IN Ejectione firmæ, It was found by ſpecial Verdict, That Mr. Graunt was ſeiſed of the Lands, &c. and by his Will deviſed the ſame to Joan his Wife, for life; and farther he willed, That when Richard his brother ſhall come to the age of 25 years, he ſhould have the Lands to him and the heirs of his body lawfully begotten. Mr. Graunt died, having iſſue of his body, who is his heir, Richard, before he had attained the age of 25 years, levied a Fine of the ſaid Lands, with Proclamations in the life, and during the ſeiſin of Joan, to A. Sic ut partes ad finem nihil habuerunt: and if this Fine ſhould bind the Eſtate-tail was the Queſtion; And the Juſtices cited the caſe of the Lord Zouch, which was adjudged, M. 29 and 30 Eliz. Tenant in tail diſcontinues to E. and afterwards

terwards levieth a Fine to B. although the partes ad finem nihil habuerunt, yet the Fine ſhall bind the entail: But the Serjeants at Bar argued, That there is a great difference betwixt the Caſe cited, and the Caſe at Bar; for in that Caſe, the ſaid Fine was pleaded in Bar, but here the Fine is not pleaded, but found by ſpecial Verdict; To which it was ſaid by the Court, that the ſame was not any difference; For the Fine by the Statute is not any matter of Eſtoppel, or concluſion; but by the Statute doth bind and extinguiſh the Eſtate-tail, and the right of it; and Fines are as effectual to bind the right of the entail when they are found by ſpecial Verdict, as when they are pleaded in Bar: And by Periam, Collateral Warranty found by Verdict, is of as great force, as if it were pleaded in Bar, And afterwards Judgment was given, That the Eſtate-tail by the Fine, was utterly deſtroyed and extinct.

*Trin.* 29 *Eliz.* In the Common-Pleas.

## XLIX. Jay's *Caſe.*

JAY brought an Action of Debt before the Mayor of Shrewsbury, &c. and declared upon an Obligation which was upon condition to pay money at London, and iſſue was there joined upon the payment. And it was moved how this iſſue ſhould be tried, viz. If it may be removed by Certiorare into the Chancery, and thence by Mittimus into the Common-Pleas, and from thence ſent into London to be tried, and when it is tried, to be remanded back to Shrewsbury to have Judgment: See 21 H. 7. 33. Upon voucher in the County Palatine of Lancaſter, the Law is ſuch in matters real; for real actions cannot be ſued but in the ſaid County Palatine, but in perſonal matters it is otherwiſe, for ſuch actions may be ſued elſewhere, at the pleaſure of the party; And thereunto agreed the whole Court: and although ſuch matters have been removed before, yet the ſame were without motion to the Court, or oppoſition of the other party, and ſo not to be accounted Precedents: See 3 H. 4. 46. abridg'd by Brook, Cauſe de remover Plea 41. Where he ſaith, That a Foreign Plea pleaded in London in Debt, goes to the juriſdiction; but upon a Foreign Voucher in a Plea real, the Plea ſhall be removed in Bank by the Statute to try the Warranty, and afterward ſhall be remanded. 4 Inſt. 205.

*Trin.* 29 *Eliz.* In the Common Pleas.

## L. Sands *and* Scagnard's *Caſe.*

IN an Action upon the Caſe, The Plaintiff declared, that he was poſſeſſed of certain Chattels which came to the Defendant by Trover. The Defendant pleaded, That heretofore the Plaintiff brought Debt againſt the now Defendant, and demanded certain moneys, and declared, that the Defendant bought of him the ſame goods, (whereof the Action is now brought) for the ſumm then in demand, to which the then Defendant waged his Law and had his Law; by which Nihil Capiat per breve, &c. was entred. And demanded Judgment, if, &c. And by Windham and Rodes, Juſtices, The ſame is no bar in this Action, for the waging of the Law, and the doing of it, utterly diſproves the Contract ſuppoſed by the Declaration in the ſaid Action of Debt, and then the Plaintiff is not bound by the ſuppoſal of it, but is at large to bring this Action; and ſo Judgment was given for the Plaintiff.

*Trin.*

*Trin.* 29 *Eliz.* In the Common-Pleas.

## LI. Spittle *and* Davie's *Case.*

Owen Rep. 8, 55.

IN a Replevin, the Case was, That one Turk was seised of certain Lands in Fee, and by his Will devised parcell of his said Lands, to his eldest Son in tail, and the residue of his Lands to his younger Son in Fee, Provided, that neither of my said Sons shall sell or make Leases of the Lands given or bequeathed unto them by this my Will, or doe any Act with any of the said Lands, to the hindrance of their children or mine, by any devise or means, before they come to the age of 30 years; and if any of my Sons doe so, then my other Son shall have the portion of my Lands so devised to his Brother, the eldest Son before his age of 30 years leased the Lands to him devised, ut supra, for years, against the intent of the said Proviso. The younger Son entred, and he leased the same Land for years before his age
2 Cro. 398. of 30 years, Upon which the eldest Son did re-enter, and the opinion of the Court was, that here is a Limitation, and not a Condition; and here the re-entry of the eldest Son was holden unlawfull; for this Proviso did not extend but to the immediate Estate devised, expresly to them, and not to any new Estate, which did arise upon the limitation; and when the younger Son enters upon the eldest Son by the said Limitation, he shall hold his Estate, discharged of the Proviso, or any limitation contained in it.

*Trin.* 30 *Eliz.* In the Exchequer.

## LII. Martin Van Henbeck's *Case.*

AN Information was exhibited in the Exchequer, against Martin Van Henbeck, Merchant-stranger, upon the Statute of 18 H. 6. Cap. 17. concerning the gaging of vessels of Wine, and shewed, That the Defendant had sold to such a one, so many pipes of Wine, and that none of them did contain as they ought, 126. gallons; and although they were so defective, yet the Defendant had not defalked the price, &c. according to the want of measure, for which he had forfeited to the Queen, all the value of all the Wine so defective. Exception was taken to the Information, because there is not set down how much in every pipe was wanting, as one or two gallons, &c. so as a ratable defalcation might be made according to the proportion of the want of measure; But if the Informer had set forth in his Information, that no defalcation was at all, such general allegation of want of measure, without other certainty, had been good. And the Case was cited, 32 E. 4. 40. Lysle's Case, Where the plea wants certainty; or where he pleads that he was ready to shew to the Council of the Plaintiff his discharge of an Annuity, &c. and doth not shew what manner of discharge, as release, &c. So 2 H. 7. 6. in Dower, against the heir, who pleads in Bar, Detainment of Charters, without shewing what Charters in certain: also there is time enough of defalcation, when the time of payment comes, and not upon the Contract; and it is not shewed, that the Vendee had paid for the Wine. Egerton, Solicitor, contrary, When the thing demanded is to be recorded, there it ought to be certainly shewed, but contrary, where it goeth onely to the point of Conveyance of the Office; and here, the thing to be abated is not in question; for be it more or less, the Defendant is to lose the value of all the Wine, and that which is to be defalked, is but

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an Induction, or Conveyance tending to the payment of the forfeiture: As in Partridge's Case, 7 E. 6. Plow. 85. Whereupon the Statute of 32 H. 8. Maintenance, The Plaintiff charges the Defendant with a Lease for years, made to a stranger, without shewing for what term certain, and yet it was there holden well enough, notwithstanding that the Lease was not to be forfeited, but was a Conveyance to the point of forfeiture; i. the value of the Lands 38 Ass. 12. A Steward of a Leet was presented, for that he had suffered many Brewers and Bakers to bake and brew, contrary to the Assise, pro redemptione inde capiend. without shewing in certain, what Bakers, or of whom he had taken redemption; but notwithstanding that, the Defendant took issue upon the matter, &c. And it is impossible for the Informer, to know the quantity of the full measure of every pipe of Wine, which doth not belong to him, but to another, and if the Law should compel him to this impossibility, the Statute should be of none effect. 3 E. 3. 363. In Nusance for drowning of his Lands, exception was taken, because it was not set forth what quantity of land, but it was not allowed; for it is impossible to know, to what depth the land was drowned, and how much of the land was drowned: So here the Informer cannot know every spoonfull, &c. And he said, that the defalcation ought to be at the time of the Contract, or within convenient time after. Coke, contrary, Here is a great incertainty, which is not tolerable in an Information, for the quantity of the want is uncertain, and so likewise the quantity of the defalcation, for the want must be fourty, twenty, ten, five, or one gallon, pottle, quart, or pint, and in such Information upon penal Laws, the matter of it ought to be certainly shewed. Oportet ut res certa deducatur in judicium, so as the Court may judge thereof: as where an Information is exhibited upon the Statute of Usury, That Statute is, that if any take above 10l. for the loan of 100l. for one year, he shall forfeit the whole value of the principal, here there ought to be an usurious Contract for above 10l. in the hundred; and also there ought to be a taking; and it is impossible to discover the subtilty of an Usurer: But if Information be exhibited here against an Usurer, and chargeth that he took more then 10l. in the hundred, without shewing how much, such Information is utterly insufficient; for the Informer ought to set forth the quantity of the interest received, and yet the same is not to be recovered: Also if the Informer setteth for an usurious Contract, Cum quodam homine ignoto, it is insufficient, 5 H. 7. 17, 18. If an Information be exhibited upon the Statute of Liveries, as well the giver as the taker, ought to be certainly shewed, &c. Another exception was taken, because the words of the Information are, Quæ quidem dolia, vel eorum aliquod, &c. did lack, &c. But by Manwood, the same is well enough, Wherefore Coke did not speak to it; And he said, that the time of the defalcation of the price is upon the payment, and not before. If J. S. lend to one 100l. for a year, and upon the loan, contract with me, to give me 20l. for the loan of the same for one year, If now when I pay him he taketh but 10l. he shall not be punished for the Contract, but perhaps the Bond shall be void. And upon the Statute of 5 E. 6. of Ingressors, If the Information be, that the Defendant hath bought Corn, &c. it is not sufficient; for the words of the Statute are, Get into his hands, &c. Owen Serjeant to the same purpose: He hath not alledged, Quantum, vel in quanto defecit, If there had been but a Pint, it had been sufficient; The Information goes farther, Non defalcavit tantum de pretio, quantum defecit, and so tantum, & quantum, is incertainly laid; 22 H. 6. If A. be bound to B. to make him a sufficient Estate in such Lands, in an Action brought upon such an Obligation, it is no plea to say, That he hath made unto him a sufficient Estate, &c. but he ought to shew what Estate, So 7 E. 4. If one be bound to repair such a house, It is not sufficient to say, that he hath repaired it, but he

he ought to ſhew, in hoc, vel in illo: Egerton, The abatement ſhall be upon the Contract. And afterwards Judgment was given againſt the Informer, becauſe it is not ſhewed in the Information in how many Veſſels there was want; but if he had alledged but the want of one Pint, it had been good for the value of all the Wine: And by Manwood that might have been well enough known by the Gauging how much every Veſſel wanted.

*Mich.* 30 *Eliz.* In the Exchequer.

## LIII. Green *and* Everard's *Caſe.*

IN Ejectione Firmæ againſt Everard by Green, the parties were at iſſue, and the ſaid Green challenged one of the Jurors, and aſſigned for cauſe, becauſe the ſaid Juror held Land under the ſame Title as the Defendant did: To prove which one Lancelot Chandler was produced as a Witneſs for the ſaid Green, who depoſed upon the ſaid Challenge the ſame, for which the Juror challenged was drawn, and ſo there was no Inqueſt: and ſo the Plaintiff was delayed of his Trial: whereupon he ſued the ſaid Lancelot, tam pro Domina Regina quam pro ſeipſo: and it was found for the Plaintiff. And now Exception in Arreſt of Judgment was put into the Court engroſſed in Parchment; viz. Ad Judicium pro Domina Regina, & præfat. Querente, Curia procedere non debet, quia manifeſte apparet, per informat. dict. Querent. quod ipſe non fuit pars gravata, quod per calumniam in dicta informatione ſpecificat. ac per juram. dict. Lancelot ſuper inde fact. dictus Querens, non fuit damnificat. ſed in calumnia prædict. & jurament. prædict. ſuper inde factum tendebat in commodum ipſius Everardi, propter quod ipſe idem Everardus tempore calumniæ prædict. exiſtens tenens Tenementorum prædictor. per dict. declarat. ſpecificator. eadem Tenementa ratione calumniæ prædict. ac prædict. jurament. tenebat & proficua inde provenientia diutius quam aliter ſi præſens Triatio habita fuiſſet ſine aliqua calumnia tenere potuiſſet. See the Statute of 5 Eliz. againſt Perjury, the words are, grieved, letted, or moleſted, &c.

*Mich.* 30 *Eliz.* In the King's-Bench.

## LIV. George ap Rice's *Caſe.*

George ap Rice, Tenant in Tail after poſſibility of Iſſue extinct, aſſigned his Eſtate to one A. againſt whom he in the Reverſion brought a Quid juris clamat, and it was adjudged that he ſhould Attorn; for although Tenant in Tail after poſſibility of Iſſue extinct, himſelf is not compellable to attorn, yet his Aſſignee ſhall attorn; for the privilege is knit to the perſon who is in truth Tenant in Tail after poſſibility of Iſſue, which cannot be the Aſſignee, for by the Aſſignment the privity and the privilege are deſtroyed. And where the Defendant, in a Quid juris clamat, is adjudged to attorn, Diſtreſs infinite ſhall iſſue forth againſt him, to compell him to attorn; and if he, when he appears, doth refuſe to attorn, he ſhall be impriſoned until he doth attorn: And this Judgment, That the Aſſignee of Tenant in Tail after poſſibility ſhould attorn, being given in a Court in Wales, was afterwards affirmed in a Writ of Error brought upon it in the King's Bench.

1 Len. 290. 291.

30 *Eliz.* In the Common Pleas.

## LV. Lucas *and* Picroft's *Case.*

THE Caſe was, That an Aſſiſe of Novel diſſeiſin was brought in the County of Northumberland of two Acres of Land; and as to one Acre, the Defendant pleaded a Plea tryable in a Foreign County, upon which the Iſſue was adjourned into the Common Pleas, and from thence into the Foreign County, where by Niſi prius it was found for the Plaintiff: And now Snag, Serjeant, prayed Judgment for the Plaintiff, and cited the Book of 16 H. 7. 12. where Aſſiſe is adjourned in Bank for difficulty of the Verdict, they there may give Judgment But the whole Court is of contrary Opinion; for here is another Acre, the Title of which is to be tryed before the Juſtices of the Aſſiſe, before the Tryal of which no Judgment ſhall be given for the Acre for which the Title is found: And the Aſſiſe is properly depending before the Juſtices of the Aſſiſe, before whom the Plaintiff may diſcontinue his Aſſiſe: And it is not like unto the Caſe of 6 Aſſ. 4. 8 Aſſ. 15. where in an Aſſiſe, a Releaſe dated in a Foreign County is pleaded, which was denyed, for which cauſe the Aſſiſe was adjourned in Bank, and there found by Inqueſt not the Deed of the Plaintiff: now the Plaintiff, if he will releaſe his damages, ſhall have Judgment of the Freehold preſently: But in our Caſe, parcel of the Lands put in view doth remain not tryed, which the Plaintiff cannot releaſe as he may the damages: And therefore the Court awarded. That the Verdict ſhould be ſent back to the Juſtices of the Aſſiſe. 3 Len. 137. Poſtea. 199. 14 H. 7. part 118.

*Mich.* 30 *Eliz.* *In communi Banco.*

## LVI. Povye's *Caſe.*

POvy, an Attorny of the King's Bench, brought an Action of Treſpaſs there againſt the Warden of the Fleet, who came into the Common Pleas and demanded the Advice of the Court, becauſe he is an Officer of this Court, and therefore ought not to be impleaded elſewhere: But it was ſaid by the Court, That becauſe that the Plaintiff hath alſo his Privilege in the King's Bench, as well as the Defendant hath here, this equality of Privilege ſhall render the parties at liberty; and he ſhall have the benefit of the Privilege who firſt begins Suit: and ſo the Warden of the Fleet was adviſed to anſwer. 3 Cro. 180.

*Hill.* 29 *Eliz.* In the Common Pleas.

## LVII. Inchley *and* Robinſon's *Caſe.*

IN an Ejectione Firmæ, it was found by ſpecial Verdict, That King E. 6. was ſeiſed of the Manor and hundred of Fremmington, and by his Letters Patents granted the ſame to Barnard in Fee, rendering 130l. per annum, and alſo to hold by Homage and Fealty; and afterwards Queen Mary reciting the ſaid Grant by E. 6. and the Reſervation upon it granted to Gartrude, Marchioneſs of Exeter, the Manor of Fremmington, and the ſaid Rents and Services; and alſo the Manor of Camfield, and other Lands and tenements, to be holden by the twentieth part of a Knight's Fee: Gertrude ſo ſeiſed, deviſed to Owen Rep. 88. 3 Len. 165.

the Lord Montjoy the Manor of Fremmington, the Manor of Camfield, &c. and alſo bequeathed divers ſums of money to be levied of the premiſſes: and they farther found, That the ſaid Rent of 23ol. was the full third part of the yearly value of all the Lands and Tenements of the Deviſor. The Queſtion was, If by thoſe words of the Deviſe, Of the Manor of Fremmington, the Rent and Services of the Manor did paſs? i. the Rent and the Homage and the Fealty reſerved, the Grant of King E. 6. of the Manor and Hundred of Fremmington? and if the ſaid Rent and Services are iſſuing out of the Manor? for if the Rent doth not paſs, then the ſame is deſcended to the Heir of the Marchioneſs; and then being found the full and third part of the value, the King and the Heir is fully anſwered and ſatisfied, and then the Inheritance of the reſidue diſcharged, and ſettled in the Deviſee: And if the Rent doth not paſs, then is the Heir of the Marchioneſs entitled by the Statute to a third part of the whole.

Shuttleworth, Serjeant, If the Marqueſs had deviſed by expreſs words the ſaid Rent and Services, they could not have paſſed: for as to the Services, they are entire things, as Homage and Fealty, and they cannot paſs by Deviſe in caſe where Partition is to follow, for ſuch things cannot receive any Partition or Diviſion, therefore they are not diviſible; for the Statute doth enable the Proprietor or Owner to deviſe two parts of his Inheritances, in three parts to be divided; i. as Catalla Felonum cannot be deviſed for the reaſon aforeſaid; which was granted by the whole Court. And as to the Deviſe, he argued much upon the grounds of Deviſes, and put a ground put by Fineax, 15 H. 7. 12. where every Will ought to be conſtrued and taken according as the words do import, or as it may be intended or implyed by the words, what the meaning of the Teſtator was out of the words of the Will. See thereof a good Caſe 19 H. 8. 8. and 9. and he relied much upon the Caſe of Bret and Rigden, Plow. 342. So he ſaid in this caſe, becauſe the intent of the Deviſor doth not appear upon the words of the Will, that this Rent ſhould paſs; it ſhall not paſs, for there is not any mention made of any Rent in all the Will.

Fenner contrary, and he argued much upon the favorable conſtruction which the Law gives to Wills, 14 H. 3. Reverſion for Remainder, & è contr. 17 E. 3. 8. A man may make a Feoffment of a Manor by the name of a Knights Fee, à fortiori in caſe of the Deviſe: and in our caſe the Marquis conceived, That the Rent and Services reſerved out of the Manor of Fremmington was the Manor of Fremmington; and the Law ſhall give ſtrength to that intention.

Walmſly conceived, That the Rent did not paſs by the name of Manor, &c. for this Rent, nec in rei veritate, nor in reputation, was ever taken for a Manor: Alſo the words, Of the Manor and Hundred of Fremmington, are put amongſt others which are Manors in truth; by which it ſeemeth, That the Deviſor did not intend to paſs but one Manor, and no other Hereditaments, by that Manor of Fremmington. It is a Rule in Law, That in the conſtruction of a Will a thing implyed ſhall not controul a thing expreſſed: But here, if by implication the Rent ſhall paſs, then the Manor of Camfield ſhall not paſs, which it was the intent of the Deviſor to paſs, and that by expreſs words, See 16 Elizab. Dyer 330. Clatche's Caſe: and ſee 16 Eliz. Dyer 333. Chapman's Caſe. But in our Caſe here, there are not any ſufficient words to warrant any implication; for neither in truth nor in reputation was it taken to be a Manor: 22 H. 6. 2. Green Acre might paſs by the name of a Manor, although it were but one Acre of Land, becauſe known by the name of a Manor. See accordingly 22 H. 6. 39. And ſee, where, before the Statute of Uſes, a man had Recoverors to his uſe, and he wills by his Will, That his Truſtees ſhould ſell his Lands, they may ſell. And he ſaid, That if a man ſeiſed of a

Manor

Manor parcell in Demeſne, and parcell in ſervice, and he grants the Demeſnes to one and his Heirs, and afterwards deviſeth his Manor, peradventure the ſervices ſhall paſs; but this Rent hath no reſemblance to a Manor.

Gawdy, This Rent ſhall paſs by the name aforeſaid. Favourable conſtruction is to be always given to Wills, according to the intent of the Deviſor, and no part of a Will ſhall be holden void, if by any means it may take effect; then here it appeareth, that his meaning was, that upon theſe words every thing ſhould paſs to the Deviſee concerning the ſaid Manor of Fremmington; for otherwiſe, the words of the Manor of Fremmington ſhould be void and frivolous, which ſhall not be in a Will, if any reaſonable conſtruction can be; for it is found expreſly by the Jury, That neither at the time of the Will made, nor at the time of the death of the Deviſor, the ſaid Deviſor had any thing in the ſaid Manor of Fremmington, but onely the ſaid Rent of one hundred and thirty pounds. And it may well be taken that the Deviſor being ignorant what thing a Manor is, though that the Rent was a Manor, becauſe that he had Rents and ſervices out of the Manor. For in conſtruction of Wills, the words ſhall ſerve the intent of the party; and therefore if a man deviſeth, That his Lands ſhall be ſold for the payment of his debts, his Executors ſhall ſell them, for the intent of the Teſtator naming the Vendors, is ſufficient: And ſee Plowden, 20 Eliz. 5. 24. L. after the Statute of 27 H. 8. deviſeth that his Executors ſhall be ſeiſed to the uſe of A. and his Heirs in Fee, whereas then there was no Feoffees to his uſe; the ſame was holden a good Deviſe of the Lands of A. and the Judges conceived, that the Deviſor was ignorant of the operation of the Statute in ſuch caſe, and therefore his ignorance was ſupplied: See Br. Deviſes, 44. 29 H. 8. A. had Feoffees to his uſe, and afterwards, after the Statute of 27 H. 8. willed that his Feoffees ſhould make an Eſtate to B. and his Heirs, it was holden by Baldwin, Shelley and Mountague, Juſtices, that it was a good Deviſe: See 26 H. 6. Feoff. 12. A Carve of Lands may paſs by the name of a Manor, Ergo, à multo fortiori, Rent, for Rents and Services have more nearneſs, and do more reſemble a Manor than a Carve of Lands; and it cannot be intended, that the meaning of the Teſtator was to grant the Manor it ſelf, in which ſhe had nothing, eſpecially by her Will; for covin, colluſion, or indirect dealing, ſhall not be preſumed in a Will: Alſo the Marchioneſs, for four years together before her death, had the Rent and Services of the ſaid Manor, and ſhe well knew, that ſhe had not any other thing in the ſaid Manor, but the ſaid Rent and Services; and therefore it ſhall be intended, that that was her Manor of Fremmington, A. ſeiſed of a Capital Meſſuage, and great Demeſnes lying to it, leaſeth the ſame for years, rendring Rent, and afterward deviſeth to another all his Farm, lying in ſuch a place, It was rated in that caſe, that by that Deviſe, the Rent and the Reverſion ſhould paſs: See the Caſe betwixt Worſelie and Adams, Plowd. 1 Eliz. 195. by Anthony Brown and Dyer. Periam, Juſtice, was of opinion, that this Rent might be divided well enough; But by Anderſon, It is but Rent-ſeck; but Periam ſaid, it was a Rent diſtrainable of common Right, but all of them agreed, that the Rent might be divided, but there ſhould not be two Tenures. And the Lord Montjoy being adviſed that this Rent did not paſs by the Grant, but deſcended to the Heir, being the full part of the whole, entred into all the reſidue of the Lands, and made a Leaſe of the Manor of Camfield unto the Plaintiff, upon which entry, the Ejectione firmæ was brought, and afterwards the Plaintiff ſeeing the opinion of the Court to be againſt him, and for the Deviſee of the Rent by the name aforeſaid, did afterward diſcontinue his ſuit, &c.

*Trin.* 30 *Eliz. Intrat. T.* 28 *Eliz. Rot.* 507. In the Common-Pleas.

## LVIII. Coſtard *and* Wingfield's *Caſe.*

6 Co. 63. IN a Replevin, the Defendant did avow for damage-feaſant, by the commandment of his Maſter, the L. Cromwel; The Plaintiff by way of Replication did juſtifie the putting in of his cattel into the Land, where, &c. by reaſon that the Town of N. is an ancient Town, and that it had been uſed time out of mind, &c. That every Inhabitant of the ſaid Town, had had common for all manner of cattel levant and couchant within the ſaid Town, and ſo juſtified. The Defendant ſaid, that the houſe in which the Plaintiff did inhabit in the ſaid Town, and by reaſon of reſidency in which Houſe he claimed common, was a new houſe erected within 30 years; and that before that time, there had not been any houſe there, upon which the Plaintiff did demurr: Shuttleworth, Serjeant, argued for the Plaintiff, That he ſhould have common there by reaſon of reſiancy in the ſaid new houſe; and he ſaid, that the Reſiancy is the cauſe, and not the Land, nor the perſon thereof; and thereupon he put the Caſe of 15 E. 4. 29. And he agreed the Caſe, That if the Lord doth improve part of the common, that he ſhall not have common in the reſidue of the Land, for the Lands improved, becauſe, That he cannot preſcribe for that which is improved, as the Book is, in 5 Aſſ. But here in the principal Caſe he doth not preſcribe in any perſon certain, or in, or for any new thing; but he ſets forth that the uſe of the Town hath always been, that the inhabitants ſhould have common there, And this common is not common appendent, or appertinent, but common in groſs, See Needham, 37 H. 6. 34. b. And he ſaid, That if the houſe of a Freeholder, which hath uſed to have ſuch common, doth fall down, and he erecteth a new houſe in another place of the Land, that he ſhall have common to that new erected houſe as he had before? And he took a difference betwixt the caſe of Eſtovers, where a new Chimney is erected, and this Caſe, and he ſtood much upon the manner of the preſcription. Gawdy, Serjeant, contrary, And he took exception to the preſcription; For he ſaid, that it is ſaid therein; That it is Antiqua Villa, but he doth not ſay, that it hath been ſo time out of mind, &c. and ſo it ought to be ſaid, as the Book is in 15 E. 4. 29. a. And then, if it be not an ancient Town time out of mind, the parties cannot preſcribe as Inhabitants of the ſaid Town, to have common time out of mind, &c. And he ſaid, That if ſuch a preſcription as is ſaid in this Caſe be good in Law, viz. That every one who erected a new houſe within the ſaid Town, ſhould have common to his ſaid new houſe, the ſame ſhould be prejudicial to the ancient Town, and to the utter overthrow and manifeſt impairing of the common there; and it might ſo happen, that one who had but little Lands in the ſaid Town, might erect twenty new houſes there, and ſo an infinite number of houſes might be newly erected there; and there ſhould be common allowed to every Inhabitant within the ſaid new erected houſes, which ſhould be inconvenient and unreaſonable. Anderſon, chief Juſtice, He who erects a new houſe, cannot preſcribe in the common, for then a preſcription might begin at this day, which cannot be; and he inſiſted much upon the general loſs which ſhould happen to the ancient Tenants, if ſuch a preſcription for new erections ſhould be good. Periam, If it ſhould be Law, That he ſhould have common in this Caſe, That all the benefit which the Statute gives to the Lord for improvement, ſhould be taken away by ſuch new edifications and erection of new houſes, which were not reaſonable; And ſuch was the opinion of the other Juſtices, and there-

therefore they all agreed, that in the principal Caſe, the Plaintiff ſhould not have common to this new erected houſe; but the entry of the Judgment was reſpited untill the Court had ſeen the Record, and after they had ſeen and conſidered upon the Record, Anderſon and Periam were of opinion as before: But Windham did not encline to the contrary; but they all agreed, That he who ſet up again a new Chimney where an old one was before, ſhould have Eſtovers to the ſaid new Chimney: and ſo if he build a new houſe upon the foundation of an old houſe, That he ſhould have common to his ſaid houſe new erected: So if a houſe falleth down, and the Tenant or Inhabitant ſets up a new houſe in the ſame place: Alſo if a man hath a Mill, and a Watercourſe to it time out of mind, which he hath uſed time out of mind to cleanſe, if the Mill falleth, and he erecteth a new Mill there, he ſhall have the Watercourſe, and liberty to cleanſe it, as it had before, and afterwards the ſame Term, Judgment was given for the Defendant, to which Windham, Juſtice, agreed.

*Hill.* 29 *Eliz.* In the King's-Bench.

## LIX. Rous *and* Artois *Caſe.*

THE Caſe was large, but the points in this Caſe were but two: The firſt was, If Tenant per auter vye, after the death of Ceſtuy que vye holdeth over. If he be a Diſſeiſor or not: The ſecond point was, If Tenant at will, or at ſufferance, be ſuch a Tenant of the Manor as he may grant Copyhold Eſtates to Copyholders: For the firſt point; It was agreed by Godfrey, and he held, that the principal Caſe was, That if Tenant pur auter vye holdeth over the life of Ceſtuy que vye, that he thereby gaineth the Fee; But he granted the Caſes, That where a man holdeth at the will of another, that after the Eſtate determined, if he holdeth over, he hath not thereby gained fee, for he is Tenant at ſufferance; and as Littleton ſaith in his Chapter of Releaſes, 108. Tenant at ſufferance, is where a man of his own head occupieth the Lands and Tenements at the will of him who hath the Freehold; and ſuch an occupier claims nothing but at will; But he ſaid, That in the principal Caſe, he otherwiſe claimed than at the will of the Leſſor; for that it appeareth, that he hath granted Copy: and he ſaid, that this difference doth give anſwer to the Caſe which is, t. H. 8. br. t. per Copy 18. where it is ſaid for Law, That none is Tenant at ſufferance, but he who firſt enters by authority of Law: As if a man makes a Leaſe for years, or for the life of another, and he holdeth the Lands after his term expired, or after the death of Ceſtuy que vye; If he claim nothing but at the will of him who hath the Freehold; he is a Tenant at ſufferance. But if he holdeth in the Lands againſt the will of his Leſſor, then he is a Diſſeiſor; and ſo if he do act after ſuch continuance of poſſeſſion, contrary to the will of his Leſſor, he is a Diſſeiſor, 10 E. 4. If an Infant maketh a Leaſe at will, and the Leſſor dieth, and the Leſſee continueth in poſſeſſion, and claims Fee, the Heir ſhall have Mortdanceſter, 18 E. 4. If Ceſtuy que vye dieth, and the Tenant hold in, and was impleaded, The Leſſor ſhall not be received, and he conceived the reaſon of the Caſe to be, becauſe that the reverſion was not in him; but that the Fee was gained and reſted in the other, 22 E. 4. 39. g. by Huſſey. If a Termor holdeth over his term, there an Eſtate in Fee is confeſſed to be in him, becauſe he holdeth the poſſeſſion of the Lands by wrong; but there is a Quære made of it, if he be a Diſſeiſor or not, but I conceive that he is, for Treſpaſs doth not lie againſt him, before the Leſſor hath made his entry; and therefore, if the Leſſee doth continue in the poſſeſſion of the Lands by reaſon of the firſt entry; that is the reaſon

Owen Rep. 27. 4 Co. 24.

reason, as I conceive, that the Writ of Entre ad terminum qui præteriit, lieth against such a Termor, who holds so over his Term; and that Writ is a Præcipe quod reddat, which doth not lie but against a Tenant of the Freehold. And such is the opinion of Tilney, 7 H. 4. 43. That if the Guardian holds in the Lands at the full age of the Heir; or if the Tenant for years after the term expired, holdeth over the Lands, their Estates shall be adjudged a Fee. And in our Case here, he doth not claim to hold in at the will of the Lessor; for he hath done an act contrary to the will of the Lessor; For he being Lord of the Manor, in manner as aforesaid, hath granted Estates by Copy; and it is holden, 12 E. 4. 12. by all the Justices, That if Tenant at will, or Tenant at sufferance at will, makes a Lease for years, that the same is a Disseisin to the Lessor, and the Tenant at will thereby gains the Freehold: and the reason of the Book seems to be, because he claims to hold a greater Estate than of right belongs unto him. The second point was, If Tenant at sufferance might grant Copies, and he said, that he might, and such grant should be good, because he is in by lawfull means, and an Assise doth not lie against him, as in the Book of 22 E. 4. 38. before, and he is Dominus pro tempore. And this Case is not like to the Cases, where Copies are made by Abators or Disseisors; for the Law doth adjudge, that Copies made or granted by them are void, and his act here as a Tenant at sufferance of making and granting of the Copies stands with the custome of the Manor which warrants them; as in the Case of Grisbrook and Fox, if an Administrator made by the Ordinary sells the goods of the Intestate; and with the money thereof arising, payeth the debts of the Intestate, and afterwards he who was made Executor proves the Will, he shall not avoid such sale of the goods, because he hath made it according to Law, and hath done no more than an Executor is compelled to doe: So 12 H. 7. 25. b. If a Baily cut down trees to repair an ancient pail, the same is good: So 4 H. 7. 14. b. If he payeth a Quit Rent, it is good. And note, 4 Mariæ Br. Tenant by Copy, 27. That the Lessee of a Manor, in which there are Copyholds, after the death of the Copyholder, may admit the Heir of the Copyholder to the Land; and so he may doe, who hath but an Estate in the Manor durante bene placito: and yet it seems by the Book, that such a Tenant of the Manor, cannot reserve and lessen Rent, but he ought to reserve the ancient Rent, or more. Coke contrary; And first he said, that he who holdeth over the life of the Cestuy que use, doth not gain any Fee where he comes in first by right, for that he is but Tenant at sufferance, 35 H. 8. Dyer 57. in the Case of the Lord Zouch, Cestuy que use for life, the remainder over in tail makes Lease for life of the Lessee, he dieth, the Lessee continueth his Estate, and the opinion of the Justices of the Common-Pleas, and of others was, that he is but a Tenant at sufferance, for the Lease was not any discontinuance of the Remainder, because he had authority by the Statute of Rich. 3. to make a Lease, and that is intended of such Estate which he might lawfully doe; and this is our Case, and so it is adjudged already. As to the second point, I grant, that Tenant for years, or at will, or at sufferance is Dominus pro tempore, but there is a difference as unto granting of Copies by them: For it was adjudged 25 Eliz. that they might grant Copies which are to be granted upon surrenders, made by Copyholders: As if a Copyholder doth surrender to the use of another, they may accept of such a surrender, and grant the Lands by Copy to him to whose use the surrender is made; But if a Copyholder dieth, they cannot grant voluntary Copies de novo. And he said that Popham, who argued the said Case in 25 Eliz. That this difference was agreed, and so adjudged in one Sleer's Case. And so 17 El. in the Case of one Stowley, where the Case was, That a Manor was devised to one, and the Devisee entred and granted Copies, and afterwards it was found that the Devise was void, and it was there holden

3 Cro. 302.

that

that Copies made by ſuch Deviſee upon ſurrenders, were good, and were not to be avoided; but contrary of Copies made after the death of Tenants upon voluntary grants. I grant, that when Ceſtuy que uſe dieth, the Eſtate for life is utterly void and gone; and therefore he is in by wrong, but he cannot thereby gain ſo great an Eſtate as a Diſſeiſor, becauſe he came in at the firſt by right. Atkinſon put a difference betwixt Tenant at will, and Tenant at ſufferance; for Tenant at will ſhall have aid, but contrary, of Tenant at ſufferance, as the Book is, 11 H. 4. a Releaſe to Tenant at will is good, contrary to Tenant at ſufferance; when after the death of Ceſtuy que uſe he holdeth over, he hath ſome intereſt, ſcil. to this purpoſe, that he ſhall not be a wrong doer, for he is neither Abator nor Diſſeiſor, therefore not a wrong doer, and then if he be in by a right, or rightfully, he is then Dominus pro tempore, and then the grants made by him by Copy are good. 7 H. 7. 3. Tenant at ſufferance, was to juſtifie the diſtraining the cattel of another damage feaſant. Coke, True, it is, the beaſts of a ſtranger, but not of the Tenant of the freehold: Gawdy Juſtice, The Leſſor cannot have Treſpaſs againſt him before entry; not becauſe he is not a wrong doer, but becauſe it is his folly that he doth not enter: All the Juſtices did hold with the Plaintiff againſt the Copy granted: and that he which granted it was but Tenant at ſufferance, and not a Diſſeiſor, nor had gained the Fee, becauſe he came in firſt by right: And therefore they awarded, that if the Defendant did not ſhew better cauſe, that Judgment ſhould be entred for the Plaintiff.

## LX. *Trin.* 29 *Eliz.* In the Exchequer.

IN the Exchequer Chamber, there was this Caſe: An Indenture Tripartite, was betwixt three, A. was one of them; and he covenanted with them, Et quolibet eorum. And the Covenant was, that the Land which he had alienedto one of them, was diſcharged of all incumbrances; and he to whom the limitation of the Lands was, but a Writ of Covenant ſole. Buckley argued, that it was well brought, and cited the Caſe of 6 E. 2. Br. Covenant 49. where one covenanted with twenty, to repair the Sea-banks, and he did not repair againſt two of them, and they two brought a Writ of Covenant ſolement, and the Writ holden maintainable, becauſe they onely were damnified, and ſo he ſaid in this Caſe: But notwithſtanding this, it was afterwards, viz. M. 30 Eliz. adjudged by the whole Court, that the Covenant did not lie by one of them onely, but ought to be brought by them both. 5 Co. 18.

brought

## *Mich.* 33 *Eliz.* In the Common Pleas.

## LXI. Carter's *Caſe.*

A Being ſeiſed of the Manor of Staple in Odiham, and of divers other Lands in Odiham, ſuffered a common Recovery of the whole, and by Indenture expreſſed the uſes in this manner, viz. of all his Lands and Tenements, in Odiham, to the uſe of his wife for life, the remainder over, &c. And of the Manor of Staple, to the uſe of his youngeſt ſon in tail; but by the clear opinion of the whole Court, although the Manor of Staple was in Odiham, yet the wife ſhall have nothing therein; for the intent of the party was, that the ſon ſhould have the ſame, and his wife the reſidue; and accordingly Judgment was given. 1 Cro. 208. Owen Rep. 84. 8 Co. 119.

Michi

*Mich.* 33 *Eliz.* In the Common Pleas.

## LXII. Cobb *and* Prior's *Case*.

THE Case betwixt Cobb and Prior was this; A man seised of Lands in Fee, devised the same to his Wife during the minority of his Son, upon condition, that she should not do Waste during the minority of the said Son, and died; The Wife married a Husband, and died; the Husband committed Waste: It was holden by all the Justices, That the same was not any breach of the Condition; and Judgment was entred accordingly.

*Trin.* 33 *Eliz.* in the Common Pleas.

## LXIII. Taylor *and* Brounsal's *Case*.

IN an Information upon the Statute of 32 H. 8. by Taylor against Brounsal, the Case was, That John Brounsal was seised, and gave the Lands to T. B. and the Heirs of his body, &c. the Remainder to R. B. and the Heirs male of his body, the Remainder to the right Heirs of J. B. T. B. died, having issue a Daughter; and R. B. made a Lease for years of the Lands: And it was holden by the Court to be no maintenance within the said Statute, for he in the Remainder might make a Lease for years: Then it was given in Evidence, That a common Recovery was had against the Husband and Wife with a single Voucher, and so the Remainder limited to R. B. destroyed, and that after that Recovery R. B. made the Lease: To which it was said by the other side, That the said Recovery was never executed, and no discontinuance of the Remainder, and then the Lease made by R. B. was good: and the truth of the Case was That such a Recovery was had, and an Habere facias seisinam awarded and returned, but no Execution was in truth had upon it, nor the Recoveror never entred: And if R. B. who is a stranger to the said Recovery shall be admitted against the Recovery to say, That no Execution was thereof, was the Question? and therefore all the matter was found by special Verdict. It was also given in Evidence, That the Land was given to T. B. and the Heirs males of his body; and then when the Daughter, which is not in truth inheritable, entereth, if that Entry, she being privy in bloud to R. her Uncle, shall be a Disseisin, or Abatement, &c. as in the Case of Littleton, where the youngest Brother entreth after the death of the Father, for in such case, the youngest Son doth not get any Freehold, but is but a Tenant at sufferance. Anderson, When the Daughter enters, and takes a Husband, who leaseth for years, and the Lessee entreth, the same is a Disseisin. Periam doubted it, for he said, When the younger Son entred, the Freehold was in him, which Anderson doubted.

*Trin.* 33 *Eliz.* In the Common Pleas.

## LXIV. Maunsel *and* Vernon's *Case*.

IN Debt by Maunsel against Hen. Vernon Esquire, who came in by Capias, i. compulsary Process, and pleaded, That he was Hen. Vernon Lord Powis, and so a Baron of the Parliament, and demanded Judgment

ment of the Writ. (Note, ſome ſaid, That if the Defendant had come in by Iſſue joyned, or gratis, and not by compulſary Proceſs, he could not have pleaded this Plea, or any other Miſnomer.) The Plaintiff replyed, That the Defendant is an Eſquire, abſque hoc, that he is Lord Powis, and a Baron of the Parliament; and as the Jury was ready at the Bar to try this Iſſue, this matter was objected. And Anderſon conceived, That this Plea to the Writ was not good, for the name of Lord is not any degree, as Knight, Duke, Earl; nor is it parcel of the name, nor parcel of addition; and therefore it is no Plea in abatement of a Writ: and all the Writs of Parliament directed to Barons to ſummon them to Parliament, ſhall have their Names, Sirnames, and Additions: as if they be Knights, Knights, and if Eſquires, they ſhall be named Eſquires; and if a Bond be made by J.S. Lord R. the Writ ſhall not be ſo, for the King by his Writ doth not name any one Lord; but otherwiſe it is of Duke, Earl, &c. for theſe are Offices of Dignity, and parcel of their Names, and not onely Additions. Windham and Periam contrary; and they conceived that there was no difference in this point betwixt a Lord and an Earl; for which cauſe the Court being in doubt, although that the Exception was entered of Record, would have ſaved the ſame to the party, and taken the Jury de bene eſſe: but afterwards, becauſe it appeared it was joyned in the prejudice of Sir Edward Herbert, who was a ſtranger thereunto, and whoſe Title was concerned therein, and there was none on his part to inform the Jury; the Jury was at laſt diſmiſſed by the Court.

*Trin.* 28 *Eliz.* In the King's-Bench.

## LXV. Penruddock *and* Newman's *Caſe*.

IN an Ejectione Firmæ by Penruddock againſt Newman, the Plaintiff declared of a Leaſe made by the Lord Morley, and upon Not-guilty pleaded, the Jury found this ſpecial matter, (ſcil.) That W. Lord Mounteagle ſeiſed of the manner of D. whereof, &c. became bound in a Statute in ſuch a ſum of Money to A. who died; the Executors of A. ſued Execution againſt the ſaid Lord, (ſcil.) Extendi facias, a Liberate iſſued, upon which the ſaid Manor was delivered to the Executors, but the ſaid Liberate was not returned: and it was farther found, That the Executors being ſo poſſeſſed of the Manor, the Lord commanded a Court Baron to be holden there, which was done by ſufferance and permiſſion of the Executors, and in their preſence: at which time the Executors ſaid to the Lord the Conuſor. We have nothing to do with this Manor. And upon this Verdict ſeveral matters were moved. 1 Leon. 279.

1. If the Execution were well done, becauſe the Writ of Liberate was not returned? and as to that, divers Books were cited, 21 H.6.8. 18 E. 3. 25. And there is a difference betwixt a Liberate, and a Capias ad ſatisfaciend. and Fieri facias, theſe Writs are Conditional, Ita quod habeas corpus, &c. Ita quod habeas denarios hic in Curia, 32 H.8.ca.28. 16 H. 7. 14. but contrary in a Writ of Habere facias ſeiſinam, or in a Liberate, for in theſe Writs there are not ſuch words; and therefore although they be not returned, Execution done by virtue of them is good enough: See 11 H. 4. 212. If the Sheriff by force of an Elegit doth deliver the moyety of the Land, and doth not return the Writ; if the Plaintiff will plead a new Action of Debt, the Defendant may plead in Bar the Execution aforeſaid, although the Writ be not returned, nor doth remain upon Record: and it is not like unto the Caſe of Partition made by the Sheriff, for that muſt be returned, becauſe that after the Return of it, a ſecondary Judgment is to be given, (ſcil.) Quod Partitio prædict. firma & ſtabilis remaneat in perpetuum, firma & ſtabilis in

perpetuum tenetur, says the Book of Entries 114. And Egerton, the Solicitor-General, cited a Case to be lately adjudged betwixt the Earl of Leicester and the Lady Tanfield, That such an Execution was well enough, although the Liberate was not returned.

Earl of *Leicester* and *Tanfields* case.

The second point was, Admitting that it be a good Execution, If the Executors being in possession of the Manor, and suffering the Consor to hold a Court there, and saying the words aforesaid in the presence of the Lord who is Consor; if the same do amount unto a Surrender, or not? And it was the Opinion of Wray chief Justice; That it was not a Surrender, for that here the words are not addressed to the Consor, who was capable of a Surrender, but to other persons: And it is not like unto the Case of 40 E. 3. 23, 24. Chamberlains Assise, where Tenant for life saith to him in the Reversion, That his Will is, that he enter upon the Land; the same is a good Surrender, because here is a person certain who may take the Land: But in our case, it is but a general speech, and therefore it shall not be a Surrender.

*Mich.* 29 *Eliz.* In the Common Pleas.

## LXVI. Baskervile *and Bishop of* Hereford's *Case.*

IN a Quare Impedit brought by Walter Baskervile against the Bishop of Hereford, and others; the Plaintiff counted, That Sir Nicholas Arnold Knight, was seised of the Advowson in gross, and granted the same to the said Baskervile and others, to the use of himself for life, and afterwards to the use of Richard Arnold his Son in tail: Proviso, That if the said Nicholas died, his Heir being within the age of twenty three years, that then the Grantees and their Heirs should be seised to themselves and their Heirs, until the said Richard had accomplished the said age. Sir Nicholas died, Richard being but of the age of fourteen years; by force whereof the Grantees were possessed of the said Advowson, &c. and afterwards the Church became void, and so it appertained to them to present.

Exception was taken to the Count by Serjeant Gawdy, because the Plaintiff had not averred the life of Richard, upon whose life the interest of the Plaintiff did depend: and he compared the same to the Case of the Parson, which had been adjudged, where the Lessee of a Parson brought an Ejectione Firmæ, and it was found for him; and in Arrest of Judgment Exception was taken to the Declaration, because the life of the Parson was not averred; and for that cause the Judgment was stayed.

Anderson, Upon the dying of Sir Nicholas, Richard being but of the age of fourteen years, an absolute Interest for nine years vested in the Grantees, not determinable upon the death of Richard; or rather, they are seised of a Fee determinable upon the coming of Richard to the age of 23 years.

Rhodes and Windham Justices, contrary; and that here is an Interest in the Grantees determinable upon the death of Richard within the term; for if Richard dieth without issue within the term, the Remainder is limited over to a stranger.

And as to the Exception to the Count, it was argued by Puckering Serjeant, That the Count was good enough; for although the life of Richard be not expressly added, yet such an averment is strongly implied, and so supplyed: For the Count is, Quod dictus Nich. obiit, dicto Richardo being of the age of fourteen years, & non amplius, by force of which the Plaintiff was possessed of the said Advowson, quo quidem Nich. sic possessionato existente, the Church voided: and possessed he could not

not be, if not that the ſaid Richard had then been alive; and that is as ſtrong as an Abetment: See 10 E. 4. 18. In Treſpaſs for breaking of his Cloſe, the Defendant pleaded, That A. was ſeiſed, and did enfeoff him, to which the Plaintiff ſaid, That long time before A. had any thing, B. was ſeiſed, and leaſed to the ſaid A. at will, who enfeoffed the Defendant, upon whom B. re-entred, and leaſed to the Plaintiff at will, by force whereof he was poſſeſſed untill the Defendant did the Treſpaſs; and that was allowed to be a good Replication without averring the life of B. who leaſed to the Plaintiff at will, for that is ſupplied by the words, ſcil. virtute cujus, the Plaintiff was poſſeſſed untill the Defendant did the Treſpaſs: See alſo, 10 H. 7. 12. In an Aſſiſe of Common, The Defendant made Title, that he was ſeiſed of a Houſe and a Carve of Land, to which, he and all thoſe whoſe Eſtate he hath, &c. had common appendant, and doth not ſay, That he is now ſeiſed of the Houſe; but the exception was diſallowed; for ſeiſin ſhall be intended to continue untill the contrary be ſhewed.

*Trin.* 29 *Eliz.* In the King's-Bench.

## LXVII. Morgan *and* Chandler's *Caſe.*

IN Debt for Arrerages of Rent, by Morgan againſt Chandler, It was found by ſpecial Verdict, That the Land out of which, &c. was aſſured by an Act of Parliament to the Marchioneſs of Northampton for the term of her life, the remainder to the Lady Bourcher, her daughter, and the heirs males of her body, the remainder to King H. 8. in Fee; And it was ordained by the ſame Act, Quod omnes conceſſiones & dimiſſiones, Anglice, Grants and Leaſes, factæ vel in poſterum fiendæ, by the ſaid Marchioneſs, of the Lands aforeſaid, per ſcript. Indentat. dict. Marchic. bonæ & validæ in Lege erunt, durante termino, &c. The Marchioneſs made a Leaſe for 21 years to Kenelm Throgmorton rendring 10 l. Rent, who aſſigned the ſame to the Defendant. The Lady Bourcher died without Iſſue, the Marchioneſs died; and if the Leaſe ſhould now bind the Queen, was the Queſtion: And it was moved by Clark of Lincoln's-Inn, That it ſhould, for the King was party to the Act of Parliament; and thoſe Eſtates for life in Tail, and in Fee, are all as one Eſtate, and derived out of one Eſtate, and the Eſtate of the King is bound with the Leaſe; and it was moved by Broughton, That the Leaſe ſhould not bind the Queen, and ſo by conſequence not her Patentee; and he cited a Caſe, adjudged upon a like Act, ſcil. the Statute of 35 H. 8. by which it was enacted, That the Lady Katharine, Wife of the ſaid King, ſhould be as a Feme ſole, and that ſhe might make Leaſes, &c. In that caſe, the Leaſes ſhould not bind the King or his ſucceſſours; for the ſaid Act did not extend to make the Leaſes good, but onely againſt Coverture. And it was obſerved by Clench, Juſtice, that in the Act of Parliament now in queſtion, It is expreſſly provided, that the Rent reſerved by the Marchioneſs, ſhould go to the lady Bourcher, but no proviſion made, that it ſhould go to the King, and therefore it is not reaſon that the King ſhould be bounden: But another matter ariſing upon the pleading, the point did not fall in judgment.

*Trin.* 29 *Eliz.* In the King's-Bench.

## LXVIII. Backhouſe *and* Spencer's *Caſe.*

SAmuel Backhouſe brought a Writ of Annuity againſt Alderman Spencer of London, and declared upon a Grant of an Annuity for term of years, and depending the Action, the term expired. And it was the 1 Roll. 228.

clear opinion of the whole Court, that the Plaintiff could not have Judgment, for the Judgment in this Writ, is, Quod querens recuperet annuitatem prædictam, and now there is not any Annuity in being, See 34 H. 6. 20.

6 Co. Higgin's Caſe. 1 Inſt. 285. a. 14 H. 7. 31. 19 H. 7. 16.

LXIX. *Mich.* 29 *Eliz.* In the Common-Pleas.

IN a Writ of Partitione facienda, The Defendant prayeth Aid, and the Plaintiff counterpleads the Aid, upon which counterplea, they are at iſſue, and it is found for the Plaintiff: It was adjudged, that ſame is peremptory to the Defendant, and the Judgment ſhall be, Non quod reſpondeat, ſed quod Partitio fiat, &c.

*Mich.* 29 *Eliz.* In the Common-Pleas.

LXX. Rolſton *and* Chamber's *Caſe.* 1 Leon. pa. 282.

ROlſton brought an Action of Treſpaſs upon the Statute of 8 H. 6. of forcible entry, againſt Chambers, and upon iſſue joined, it was found for the Plaintiff, and damages aſſeſſed by the Jury, and coſts of ſuit alſo, and coſts alſo de incremento adjudged, and all were trebled in the Judgment, with this perciole Quæ quidem damna in toto ſe attingunt ad, &c. and all by the name of damages; and it was objected againſt this Judgment, That where damages are trebled, no coſts ſhall be given, as in Waſt, &c. But afterwards it was clearly agreed, that not onely the coſts aſſeſſed by the Jury, but that which was alſo de incremento adjudged, ſhould be trebled, and ſo were all the Preſidents, as it was affirmed by all the Prothonotaries; and ſo are many Books, ſcil. 19 H. 6. 32. 14 H. 6. 13. 22 H. 6. 57. 12 E. 4. 1. Book of Entries, 334. and Judgment was given accordingly: It was alſo agreed, that the party ſo convicted of the force at the ſuit of the party ſhould be fined, notwithſtanding that he was fined before upon an Indictment for the ſame.

*Mich.* 29 *Eliz.* In the Common-Pleas.

LXXI. Wren *and* Bulman's *Caſe.*

1 Len. 282. Rolſton and Chambers.

WRen brought an Action upon the Statute of 1 and 2 of Phil. & Ma. for unlawfull impounding of Diſtreſſes againſt Bulman, and was Nonſuit, and it was moved by Shuttleworth, Serjeant, If the Defendant ſhould have coſts upon the Statute of 23 H. 8. and it was adjudged, that he ſhould not; and that appears clearly by the words of the Statute, &c. For this Action is not conceived upon any ſuch matter which is compriſed within the Statute: And alſo the Statute upon which this Action is conceived, was made after the ſaid Statute of 23 H. 8. which gives coſts, and therefore the Statute of 23 H. 8. and the remedy thereof cannot extend to any Action given by 1 and 2 Phil. & Ma. And ſo Rhodes, Juſtice, ſaid it was adjudged 8 Elizabeth.

*Mich.*

*Mich.* 29 *Eliz.* In the Common-Pleas.

## LXXII. Mery *and* Lewes's *Case.*

MEry brought an Action upon the Case against W. Lewes, Executor of David Lewes, late Master of St. Katharine, juxta London, and declared, That the said David in consideration, that Quædam pars domus fratrum & sororum Sanctæ Katharin. fuit vitiosa & in decasu, The said Mery ad requisitionem dicti Davidis repararet eandem, assumed to pay to the said Mery all such moneys that the said Mery expenderet in such reparations; And farther declared, That eandem partem Domus prædict. reparavit, &c. and upon Non assumpsit, it was found for the Plaintiff; In arrest of Judgment it was objected, That the count was too general, Quædam pars domus: For the Plaintiff ought to have shewed specially, what part of the house in certain, as Hall, Chamber, or other Rooms, but the same was not allowed; Another objection was, because it is set forth in the consideration, that the Plaintiff, Ad requisitionem dict. Davidis repararet; and the Plaintiff declared, Quod reparavit, generally, without saying, ad requisitionem dict. Davidis repa- 3 Len. 91. 2 Cro. 404. ravit, and that is not the reparation intended in the Declaration, scil. Reparatio ad requisitionem, but a reparation of his own head, and at his pleasure, and for that Case judgment was reversed.

*Mich.* 29 *Eliz.* In the Common-Pleas.

## LXXIII. Brasier's *Case.*

NOTE, It was agreed in the Case by all the Justices, and by the Prothonotaries, That if the Disseisee levy a Fine, and the Disseisee in the preservation of his right against the said Fine, enter his claim in the Record of the Fact of the Fine, that the same is not any such claim as shall avoid the Statute of 4 H. 7. See for this Case of the Lord Zouch, in Plowden's Commentaries.

*Trin.* 29 *Eliz.* In the King's-Bench.

## LXXIV. Ralph Morris's *Case.*

RAlph Morris and his Wife, libelled in the Spiritual Court, for that the Defendant called the Wife of one of the Plaintiffs, Veneficam, Sortilegam, & Incantatricem Dæmoniorum; and now came the Defendant into this Court, and surmised, that the matter of the Libell is determinable by the Common Law, and thereupon prayed a Prohibition, and it was holden by the Court, That although the offence of Witchery be in some cases triable by Law, yet the same doth not take away the jurisdiction of the Spiritual Court; and therefore, to call one a Witch, generally an Action will not lie at Law, as it hath been adjudged; But to say, that he hath bewitched such a one, an Action will lie at Law. Wray, Such Witchcraft as is made Felony by any Statute, is not punishable in the Ecclesiastical Court, but in case of slander of such Witchcraft, upon such slanderous words of Witchcraft which is not Felony, the Ecclesiastical Court shall punish the same, and afterwards in the principal Case, a Consultation was awarded.

*Trin.*

*Trin.* 29 *Eliz.* In the Common-Pleas.

## LXXV. Bardens *and* Withington's *Case*.

A Is bound in a Statute to B. and sows the Land. B. extends the Lands, which are delivered unto him in execution; it was adjudged in this Case, that the Conusee should have the Corn sowed; The same Law in case of a Recognizance.

*Trin.* 29 *Eliz.* In the Common-Pleas.

## LXXVI. Smalman *and* Lane's *Case*.

THE Case was, a Capias upon an original Process, was delivered to the new Sheriff of Warwick against Lane, at the suit of Smalman. And the Sheriff informed the Court, that before that the Process was directed to him, That the said Lane was taken in Execution by the old Sheriff, upon a judgment given against him in the King's-Bench; and that the said old Sheriff had imprisoned the said Lane, by force of the Execution in his own house, and there he remained, and prayed the advice of the Court, what return he should make upon that matter, because the said Lane was never in his possession; for all the other prisoners which were in the Gaol, and in the ordinary Prisons, were delivered to him, and the old Sheriff would not bring Lane to the place where the other Prisoners were delivered. And it was the opinion of all the Justices, That by the Law, the old Sheriff ought to deliver the body of him who is in his custody by view, to the new Sheriff; and such Prisoners ought to be brought unto him to view, and from that time, the Law shall adjudge such Prisoners to be in the possession of the new Sheriff, and not before; for he is not bound to go to them, not being in the ordinary Prison of the County. Anderson, The new Sheriff may return, That the said Lane is in Execution in custodia sua, and so charge himself; For although the Office of the old Sheriff be determined, yet it is not an escape, so long as the party be in custodia and not at large. Periam contrary, It is an escape in the old Sheriff as soon as his authority is determined, the Prisoner not delivered: See now C. 3. part 71. Wesby's Case.

*Mich.* 29 *Eliz.* In the King's-Bench.

## LXXVII. Megot *and* Broughton *and* Davie's *Case*.

1 Cro. 105. IN an Action upon the Case upon Assumpsit, it was found by Nisi prius for the Plaintiff, and afterwards before the day in Bank, one of the Defendants died, and after Judgment given, the other Defendant brought a Writ of Error in the same Court, where the Judgment was given, and assigned an Error in fact: scil. the death of one of the Defendants pendant the Writ, Vide 2 E. 3. 21. It was said, that the Case is not like the Case of an Action of Trespass, for every Trespass done by many, is several by each of them, but every Assumpsit is joint, and not several. Another point was moved, If the Court could reverse their own Judgement? Quære.

Roll 798. b. 3 Len. 96.

*Trin.*

*Trin.* 29 *Eliz.* In the Exchequer.

## LXXVIII. Farrington *and* Fleetwood's *Case*.

THE Case upon the Statute of 31 H. 8. of Monasteries, was this, The Abbat and Convent of A. &c. 29 H. 8. made a Lease of certain Lands for three lives, to begin after the death of one F. if they so long live: and afterwards, 30 H. 8, within a year before the dissolution, they make another Lease to Fleetwood: If the first Lease in the life of the said F. be such an Estate and Interest, as by virtue of the said Statute shall make the second Lease void? was the Question; for it was not in esse, but a future Interest. 3 Len. 164, 165. ante 333. Plus.

Manwood, All the reason that hath been made for the second Lease, is, because the first Lease is but a possibility; for F. by possibility may survive all the said three, and so it shall never take effect: But notwithstanding, be it a possibility or otherwise, it is such a thing which may be granted or forfeited, and that during the life of F. And note the words of the Statute; If any Abbat, &c. within one year next before the first day of this present Parliament, hath made, or hereafter shall make, any Lease or Grant for years, life or lives, of any Manors, &c. whereof and in which any Estate or Interest for life or years, at the time of the making of any such Lease or Grant, then had his being or continuance, and hereafter shall have his being or continuance, and then was not determined, &c. shall be void, &c. And here is an Interest, and that not determined at the time of the making of the Lease to Fleetwood. And of such Opinion were all the Barons, and divers other Justices; and therefore a Decree was made against the Lease, &c.

*Trin.* 29 *Eliz.* In the Exchequer.

## LXXIX. Beaumont's *Case*.

NOte, it was holden by all the Barons in the Exchequer, That a Duty which is not naturally a Debt, but by circumstances onely, as Debt upon a Bond for performance of Covenants, or to save harmless, may be assigned over to the Queen for a Debt; but in such case, a present Extent shall not issue, but a Scire facias shall issue forth, to know if the party hath any thing to plead against such Assignment. Owen Rep. 46.

*Trin.* 29 *Eliz.* In the Exchequer.

## LXXX. Goddard's *Case*.

IT was moved in the Case of Goddard concerning the Manor of Staple in Hampshire, If the Tenant of the King of Lands holden in Capite be disseised, and the Disseisor aliens the Lands, and afterwards the Disseisee doth re-enter? Manwood said, That the Land shall not be charged with a Fine for alienation without licence, because the Title of the Alienee grew under the wrong of the Disseisor; but the person of the Disseisor shall be charged with such Fine. Tenant of the King in Capite makes a Lease for life, the Lessee for life makes a Feoffment in Fee without licence, the Lessor re-entreth, neither his person nor the Land shall be charged: But if my Feoffee upon Condition maketh a Feoffment without licence, 11 Leon. 8.

licenſe, and I re-enter for the Condition broken, now my Land ſhall be charged with the Fine upon Alienation, for the Feoffee was in by me by good and lawfull Title, becauſe he had power to make a Feoffment over, although ſubject to the Condition. So if Tenant in tail, or the Husband ſeiſed in the Right of his Wife, make a Feoffment in Fee, and afterwards the Land is recontinued, the Fine accruing for Alienation without licence ſhall bind the Land: And if Tenant for life loſeth iſſues, and dieth, the Lands ſhall be charged with the ſame.

*Trin.* 29 *Eliz.* In the Exchequer.

## LXXXI. *The Lord of* Northampton *and Lord* St. John's *Caſe.*

2 Roll. 195. Co. 12. 1, 2. Co. 4. 95. Dyer 262.

THE Lord of Northampton had by ancient Letters Patents bona & catalla felonum & fugitivorum within the Iſle of Ely; and one dwelling within the Iſland was attainted of Felony, to whom another was indebted by Obligation, and the money by the Condition of the Bond was to be paid at a Manor of the Lord St. John's, who within his Manor had alſo bona & catalla felonum & fugitivorum; and at the payment the Lord St. John claimed the money: But all the Barons of the Exchequer were clear of Opinion, That the Lord St. John could not have the money, for the place of payment nihil operatur, but the Obligation is the ſubſtance which came to the Lord of Northampton within the Iſle of Ely. Popham, the Queens Attorny, claimed the money for the Queen, for the Lord of Northampton cannot have it; for by the general words of bona & catalla felonum things in Action do not paſs, but by expreſs words they well paſs, otherwiſe not: And therefore day was given to the Lord of Northampton to ſhew his Letters Patents.

*Mich.* 30 *Eliz. Rot.* 2737. In the Common Pleas.

## LXXXII. Ards *and* Smith's *Caſe.*

3 Co. 8.

EDward Ards brought a Replevin againſt Smith and Reading; the Defendants made Conuſance as Bailiffs to Robert Chamberlain, and ſhewed, That one A. was ſeiſed of the Manor of Keney in Fee, whereof the place where is parcel, and ſo ſeiſed, gave the ſaid Manor to Richard Chamberlain and Sibil Fowler, and to the Heirs males of the ſaid Richard: Richard and Sibil intermarry, and have iſſue Edward; Richard dieth, Sibil dyeth, Edward hath iſſue Leonard, and dieth; Leonard hath iſſue Francis, and dieth; Francis hath iſſue Robert, in whoſe Right the Conuſance is made, and dieth; Robert entreth: The Plaintiff in bar of the Conuſance ſheweth, That one B. was thereof ſeiſed, and thereof enfeoffed one Cottesford, then Maſter of Lincoln College, and the Fellows thereof: after which the ſaid Leonard, Son and Heir male of the ſaid Edward, 25 H. 8. did releaſe to the ſaid Maſter and Fellows with warranty, the ſaid Robert, in whoſe Right the ſaid Conuſance is made, being Heir male of the ſaid Robert, and demanded Judgment, if againſt that warranty, &c. The Defendants confeſs the Gift before to the ſaid Richard and Sibil, and that they had iſſue the ſaid Edward; but farther ſhewed, That after the death of the ſaid Richard, Sibil, and Edward her Son leaſed the ſaid Manor for years to one Maſcal, who entred, and was poſſeſſed: Edward ſuffered a common Recovery unto the uſe of the Recoverors, who entred and ouſted the Leſſee, and enfeoffed the ſaid B. who enfeoffed

enfeoffed the ſaid Maſter and Fellows; the Leſſee re-entred, Sibil died, Leonard, Son and Heir apparent of Edward, releaſed to the ſaid Maſter and Fellows with warranty; Edward died, Leonard died, and thereupon a Demurrer was by the parties: and the matter was, If this Recovery being ſuffered by him in the Remainder in tail upon an Eſtate for life, the Recoverors entring upon the Leſſee for years of the Leſſee for life, and putting him out, and afterwards the Leſſee for years re-entring: If now any Eſtate did remain in the College, after the Re-entry, which might work a Releaſe?

Snag, Serjeant, argued, That a ſufficient Eſtate did remain in the College, upon which a Releaſe might enure; i.e. an Eſtate to begin after the death of Sibil, and the expiration of the term for years: and although rei veritate, Edward was not Tenant of the Freehold at the time of the Recovery, yet ſuch an exception doth not lie for the Iſſue; and to that purpoſe he cited the Opinion of Fairfax, 12 E. 4. 14.

Shuttleworth, Serjeant, contrary; This Recovery works nothing but by way of Eſtoppel and Concluſion, and therefore the iſſue in tail may well diſcloſe the matter, and avoid ſuch Recovery: and the better Opinion in the Caſe cited before, 12 E. 4. is, That ſuch a Recovery againſt ſuch a perſon is utterly void, which ſee there by Littleton, Choke and Brian. 14 E. 4. 2. and alſo 28 Aſſ. 17. and Dyer 8 Eliz. 252, 253. Land conveyed to the Huſband for life, the Remainder to the Wife in tail, the Remainder to the Right Heirs of the Huſband and Wife; The Huſband and Wife ſuffer a common Recovery, the Huſband hath iſſue and dieth, and afterwards the Wife dieth, the iſſue ſhall avoid the Leaſe and Recovery. See alſo the Caſe betwixt Hare and Snow, Plow. 20 Eliz. 514. where a common Recovery was had againſt Tenant in tail, and his Wife, whereas in truth the Wife had nothing in the Land whereof the Recovery was ſuffered: It was holden, that the iſſue in tail, or any other perſon, might ſhew the truth of the matter; for he ſhall not be bound by any Eſtoppel which his Father hath admitted, by joyning in Voucher with his Wife, for he is not ſubject to the Eſtoppel; and therefore it was holden, That if the Wife in ſuch caſe might ſue Execution to have in value, yet the Son in tail might ouſt him of it. So 8 H. 4. 122. a Præcipe is brought againſt Tenant in tail, who prays in aid of a ſtranger as Tenant for life, who enters into the aid, and bars the Demandant, and afterwards the Tenant in tail dieth; his iſſue is at large to claim the Eſtate-tail, although the mouth of his Father was eſtopped as to it. So Tenant in tail brought a Quod ei deforceat, and counted upon an eſpecial tail, whereas in truth it was a general tail, and recovereth, and dieth; the ſaid Recovery ſhall not conclude the iſſue. See 33 H. 6. 18. And in our Caſe, when the Recoverors enter by force of the recovery, the ſame is a wrong to the Leſſee for years, and alſo to the Tenant for life; for the one is ejected, and the other diſſeiſed; and therefore the Re-entry of the Leſſee doth defeat all the Eſtate which was in the College under that Recovery: and here the Entry of the Leſſee for years ſhall avoid all the Eſtate which was conveyed to the College by the Recoverors. See 44 E. 3. 30, 31. Baſſingborn's Aſſiſe: Land is given to A. for life, the Remainder to B. for life, the Remainder to C. in Fee: A. aliens in Fee, the Anceſtor collateral of him who hath the Fee doth releaſe to the Alienee with warranty; B. enters, here the whole warranty is loſt, and all the firſt Eſtate is recontinued: So in our Caſe, by this Entry of the Leſſee, the whole Eſtate of the College under the Recovery is defeated, ſo as nothing remains in the College, upon which the Releaſe can enure, and then there is no warranty in the Caſe: And as the Caſe is here, Edward, who ſuffered the Recovery, dieth before the deſcent of the warranty by the death of Leonard, by whom the Releaſe with warranty was

made; by the death of which Edward the Intereſt which the College had in the ſaid Manor by the ſaid Recovery, and the Eſtoppel of it, was determined and utterly gone, and then the warranty deſcending afterwards cannot attach upon the poſſeſſion which was at the time of the warranty made, which was by the concluſion, which by the death of Edward is determined and removed by an Eign Title, i. the Entail. As if Tenant in tail doth diſcontinue, the Diſcontinue is diſſeiſed, Tenant in tail releaſeth with warranty to the Diſſeiſor, the Diſſeiſee entereth in the life of Tenant in tail, who afterwards dieth; the warranty works nothing for the cauſe aforeſaid. And alſo he put this Caſe, Tenant in tail of Land grants a Rent-charge in Fee, and an Anceſtor collateral releaſeth to the Grantee with warranty, and dieth, the Tenant in tail dieth, now the iſſue is bound: but if Tenant in tail dieth before him who maketh the Releaſe, now the Rent is determined by the death of Tenant in tail, and then the warranty cannot attach upon it. At another day the Caſe was moved, and conceived in theſe words, (ſcil.) Tenant for life, the Remainder in tail, Tenant for life leaſeth for years, a Recovery is had againſt him in the Remainder in tail, living Tenant for life, the Recoverors enter, and ouſt the Leſſee for years, the Son and Heir of him in the Remainder in tail releaſeth with warranty to him to whom the Recoverors have aſſured the Lands, the Leſſee enters, he againſt whom the Recovery was had dieth, the Releaſor dieth, &c. It was holden, that the Entry of the Leſſee, before that the warranty had attached upon the poſſeſſion which paſſed, had avoided the warranty. And the Lord Anderſon conceived, That the Recovery ſhould not prejudice the iſſue in tail, but that the iſſue ſhall Fauxifie the ſame: And if Tenant in tail be diſſeiſed, and ſo diſſeiſed ſuffereth a common Recovery, his iſſue ſhall not be barred, quod fuit conceſſum per omnes: And afterwards another matter was moved, (ſcil.) That the Releaſe is pleaded to be made to Lincoln College by the name of Cuſtodi ſociis & Scholaribus Lincolnienſis Collegii in Oxonia, where the true name of the College, as is confeſſed by the Record in the Plea pleaded, is, Cuſtos ſive Rector, Socii & Scholares Lincolnienſis Collegii in Oxonia, &c. It was adjourned. See this Caſe reported, (3 part, Lincoln College Caſe.)

*Mich.* 32 *Eliz.* In the Common Pleas.

## LXXXIII. Hall *and the Biſhop of* Bath's *Caſe.*

HAll brought a Quare Impedit againſt the Biſhop of Bath, and others; The Incumbent pleaded, Quod ipſe nihil habet, nec habere clamat, &c. niſi de præſentatione Georgii Sidenham militis, not named in the Writ, and demanded Judgment of the Writ, upon which the Plaintiff did demur in Law: And it was argued by Drew, Serjeant for the Plaintiff, That the Writ was well brought without naming the Patron: for if a Quare Impedit be brought againſt the Patron and Incumbent, and the Patron dieth, pendant the Writ, the Writ ſhall not abate: 9 H. 6. 30. 1 Leon. 45. It might be, that the Plaintiff did not know, nor could tell, who preſented the ſaid Incumbent, but he findeth the Incumbent a Diſturber by his Incumbency: and if of neceſſity ſuch Patron ought to be named, then if ſuch a Uſurper ſhould die before the Writ brought, he which hath cauſe of Action ſhould be remedileſs. And by Anderſon and Periam, the Writ is good enough for the reaſon aforeſaid: And Anderſon put this caſe; If A. wrongfully by Uſurpation doth preſent, and his Clark is received; and afterwards A. having gained the Patronage, grants it over to B. Againſt whom ſhall the Quare Impedit be brought? Walmſley, Againſt B. which Anderſon doubted.

Mich.

*Mich.* 32 *Eliz.* In the Common-Pleas.

## LXXXIV. Hughe's *Case.*

IN a Formedon, the Writ was, That A. Dedit Aliciæ filiæ suæ, and to J.S. and to the Heirs of their two bodies begotten, and it was shewed in abatement of the Writ, That the name of the Wife is put before the name of the Husband, To which it was said by the Court, that if such a Writ be brought against the Husband and Wife, and the name of the Wife be put before the name of the Husband, the Writ shall abate; and if in the Case at Bar it had appeared, That the Donees at the time of the Gift, were Husband and Wife, upon such a matter disclosed the Writ should abate; but that doth not appear plainly to the Court.

## LXXXV. *Mich.* 32 *Eliz.* In the Common-Pleas.

NOTE, It was holden by the Court, That if a Writ of Dower be brought against an Infant, who loseth by default at the Grand Cape; that he may reverse the same by a Writ of Error; but where an Infant appeareth by Guardian, and afterwards loseth by default, there he shall never avoid it: for if any default be in the Guardian, the Infant shall recover against him in a Writ of Deceit. And afterwards, the Judgment in the first case was reversed. 1 Cro. 567. 3 Cro. 224. Post 189.

## LXXXVI. *Mich.* 32 *Eliz.* In the Exchequer-Chamber.

NOTE, In the Exchequer-Chamber, before the Lord Chancellour, The two chief Justices, and the chief Baron; a Writ of Error was cast upon a Judgment given in the Court of Exchequer; and it was agreed, Quod propter absentiam Dom. Thesaurarii Angliæ, They ought not, nor could receive the said Writ; and the Statute of 31 Eliz. doth not help the matter, for that extends but to discontinuances, which before the Statute many times hapned for the not coming of the Chancellour or Treasurer, and not to give Conusance in a Writ of Error in the absence of the Treasurer, &c.

*Mich.* 32 *Eliz.* In the Common-Pleas.

## LXXXVII. Lacy *and* Fisher's *Case.*

IN a Replevin by Lacy against Fisher, The Defendant pleaded, that the place where, &c. is called Spicold, and holden of the Manor of Easthall by certain Rent, and made Conusance as Bailiff of the Lord of the said Manor; and issue being joined hereupon, It was tried by the Jury of the Visne of Spicold, and it was moved in arrest of Judgment, that the issue was mis-tried; For the Visne ought to have been of Spicold and Easthall also: And a Case was cited to have been adjudged accordingly betwixt Webb and Richmond. M. 31 Eliz. in the same Court. Web and Richmond's Case.

*Mich.* 32 *Eliz.* In the Common-Pleas.

## LXXXVIII. Corbet's *Case.*

THE Case was, That an Action of Debt was brought by original Writ against an Administrator in another County than where the Administrator was dwelling, and before notice of that suit, he paid divers other debts of the Intestate, due by specialties; so as he had not Assets to pay the debt in demand, having Assets, at the day of the Teste of the original, and now the Defendant appearing, pleads the same special matter, and concluded, And so nothing remained in his hands. And it was holden per Curiam to be a good Plea: See 2 H. 4. 21, 22.

*Pasch.* 31 *Eliz.* In the Exchequer.

## LXXXIX. *Sir* William Pelham's *Case.*

1 Co. 41. THE Case, short put, was this: A. Tenant for life of a Messuage, &c. the remainder in tail to B. with divers remainders over: A. by Deed indented and enrolled, bargained and sold the Messuage, &c. to conveyed to Sir William Pelham in Fee, who afterwards suffered a common Recovery thereof, in which A. is vouched; and so a common Recovery is had and executed, and all this was before the Statute of 14 Eliz. And if the said Recovery should bind B. who was in the remainder in tail; or if it be a forfeiture, was the Question. Altham of Gray's-Inn argued, that here is a forfeiture: First, it is to see, if a common Recovery suffered by Tenant for life (who is also Bargainor in this case) be a forfeiture or not by the Common Law, if no Execution be sued upon the same Recovery. Secondly, If the Recovery be executed, if he in the Remainder may enter for the forfeiture. When Tenant for life bargaineth and selleth the Messuage, &c. although upon it an Estate in Fee be limited, yet nothing passeth from him, but that which he may lawfully pass, and that was the Estate for the life of the Bargainor, for such Estate onely might lawfully pass; and here the Bargainee is but Tenant for the life of another, and when with his own consent he suffers a common Recovery and that without right, the same is a forfeiture. By matter in fact, a particular Tenant may commit a forfeiture, as well as by matter of Record: By matter in fact he cannot commit a forfeiture, if the Reversion be not thereby pulled out of him in the reversion: As if Lessee for ten years maketh a Lease for 1000 years, the same is no forfeiture, for by that the Reversion is not touched; but if he in matter of Record doe any thing which sounds to the disinheritting of him in the Reversion, although in truth it doth not touch the inheritance, yet it is a forfeiture; which see 39 E. 3. 16. If Tenant for life plead any thing against the right of him in the Reversion, it is a forfeiture. And by Finchden and Belknap, he cannot plead to the right. 5 Ass. 3. Tenant for life is impleaded in a Præcipe by a stranger, and confesseth the Action upon which the Demandant hath Judgment; the Lessor enters, against whom the Demandant sueth Execution, and the Lessor brought an issue, and had Judgment to recover, for it is a forfeiture, because the Tenant for life hath admitted the Reversion in another, because it is an alienation to the disinheritance of the Plaintiff, i. the Lessor. 19 E. 3. t. Receit 14. where Tenant for life pleads in chief, or doth not gainsay the Action of the Demandant, or makes default by Covin, he shall forfeit his Estate; but if a Rent be demanded against

Post. 65. acc. 1 Len. 264. 1 Inst. 251. b. acc. 1 Inst. 330. b.

Tenant

Tenant for life, and he render the ſame, it is no forfeiture: 22 Aſſ. 31. Tenant for life is impleaded by Covin betwixt him and the Demandant, and pleads in chief without aid prayer, upon which Judgment is given, he in the Reverſion may enter: In a Quid juris clamat, againſt Tenant for life, who pleaded faulty, traverſing the point of the Action, he in the Reverſion ſhall not be received, for in as much as the Tenant hath traverſed the Action, he is not within the Statute of Weſt. 2. of default, Reddition; but he in the Reverſion may enter by the Common Law: 22 E. 3. 2. In a Scire facias, to execute a Fine againſt Tenant for life, who pleaded to the Enqueſt, whereas in truth, the Land in demand was not compriſed within the Fine, and Judgment is given for the Demandant in the Scire facias, that he in the Reverſion may enter: In the principal Caſe here, there is apparent and manifeſt covin; for the Tenant for life is vouched without cauſe, and this Recovery is by aſſent, and is to the uſe of the Bargainee, who is Tenant for the life of another, and therefore by the Common Law, he in the Reverſion may enter before the Execution be ſued. And it is well known, that theſe common Recoveries are uſed to dock a Remainder in tail; and that was the ſcope of this Recovery: And as to the Caſe of 5 E. 4. 2. Tenant for life is impleaded in a Præcipe quod reddat, who voucheth a ſtranger, the Demandant counterpleads the vouchee, and it is found for him; he in the Reverſion hath no remedy, but a Writ of Right, and if ſuch vouchee enters into the Warranty, and loſeth by Action tried, or by default, &c. That Book is to be intended of a Recovery executed; for there in ſuch a caſe, he in the Reverſion may not enter, but is put to his Writ of Entry by the Common Law, vide Br. Tit. Forfeit 87. 24 H. 8. Tenant for life is impleaded and prayes in aid of a ſtranger, he in the reverſion may enter, but if he doth not enter untill the other hath recovered, then he cannot enter, but he is put to his Writ of Entry, Ad terminum qui præteriit, vel de ingreſſ. ad com. Legem, and therein ſhall falſifie the Recovery. And there by Brook, Voucher of a ſtranger is not a cauſe of forfeiture; for he doth not diſaffirm the Reverſion to be in the Leſſor. And he vouched, 24 E. 3. 68. where Tenant for life pleaded in the Right without aid prayer; and ſo he argued, That before execution, he in the Remainder might enter, but after execution, he is put to his Action; but in our Caſe, although Execution be ſued, yet he in the Remainder may enter, for it is found by verdict, That at the time of the Recovery he was within age, and then no Laches of entry ſhall be imputed unto him, and then he ſhall not be driven to his Action: As if Tenant by the Curteſie maketh a Feoffment with Warranty, and dieth, and the ſame deſcendeth to his Heir within age, yet he ſhall enter, although that he had not avoided the Warranty in the life of his Anceſtor; And he alſo conceived that the Statute of 32 H. 8. cap. 31. did extend to this Caſe: For Sir William Pelham, the Bargainee, was but Tenant for life, and although that he be but Tenant for the life of another, yet he is Tenant for life as fully as if he were Tenant for his own life: The words of the Statute are, or otherwiſe for the term of life or lives quo ad nom. As upon the Statute of 20 E. 1. which gives receit, i. de defenſione juris; the words are, Cum quis aliquod Breve Dom. Regis impetret verſus tenentem per Legem Angliæ, vel feodum talliatum, vel ſub nomine Dotis, vel alio modo ad terminum vitæ, &c. Alſo, although that he who entreth at the time of the recovery was not next in the Remainder to the particular Eſtate, yet he is within the Statute of 32 H. 8. for he was in the Remainder at the time of the Recovery, and at the time of the entry, he in the immediate Remainder was dead, and then he next in Remainder: See 15 E. 4. 9. by Littleton, If I grant my ſervices to one for life, and he in a Præcipe brought againſt him, plead in the Right; or granteth unto another the ſaid ſervices in Fee, the ſame is not any forfeiture, becauſe it is not any diſcontinuance. It will be objected, That

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the words of the Statute of 32 H. 8. are, That such Recoveries shall be utterly void; and if so, then he in the Reversion cannot be damnified, and then no cause of forfeiture; To that it was easily to be answered, That where Tenant for life doth any thing which sounds to the disinheriting of him in the Reversion by matter of Record, although it doth not devest or otherwise prejudice the Inheritance, yet it is a forfeiture. Coke contrary; Here in our Case there is not any Covin: Sir William Pelham, the Bargainee, he was deceived by the Bargainor, for he did not know but that the Bargainor was seised in tail at the time of the Bargain, and it was lawfull for him to doe other act in the farther assurance of his bargain; and it was also lawfull for him to vouch his Bargainor; and although the Bargainor vouched a stranger, yet it is not a forfeiture, 39 E. 3. 16. Aid prayer of a stranger is a forfeiture, and the reason thereof is, because he acknowledgeth the Reversion to be in a stranger, and that is the cause of the forfeiture. See Book of Entries 254. Where upon aid prayer, the party to have aid sheweth special matter; but in our Case, Sir William Pelham hath vouched his Bargainor, and that not without cause, for he hath a Warranty from him; and the Demandant could not counterplead it, for he had seisin, by force whereof he might make a Feoffment: As unto the Case of 14 E. 3. 1 it. Receit 135. Lessee for life in a Præcipe against him without aid prayer pleaded to the Enquest at the first day, in that case it is said, that he in the Reversion may enter. It is true, that he may enter in the Receit, but not into the Land for forfeiture, for then Fitz. would have abridged the Case in title of Entry Congeable, and not in the Title of Receit: and the Book of 5 E. 3. is good Law, for there the Tenant doth confess the Reversion to be in another; but in our Case the Tenant voucheth, which is a lawfull act done, and according to the Covenants of his purchase: And although the Recovery be by agreement, yet it is not therefore a forfeiture; for if the Tenant for life voucheth truly, it is no forfeiture. Before the Statute of West. 2. cap. 3. which gave Receit to the Wife, and to those in the Reversion where the particular Tenant is impleaded, and maketh default, vel reddere noluerit, there was no remedy in such cases, but by Writ of Right, but no entry, and that was for the reason of the credit which the Law gave to Recoveries, for if they might enter; wherefore is Receit given? but that was in two cases onely: But afterwards, because it was found, that many particular Tenants being impleaded would plead faintly, the Statute of 13 R. 2. gave receit in such cases. And upon what reasons were these Acts and Statutes made, if in such cases the entry was congeable? But after these two Statutes, another practice was devised, for such particular Tenants would suffer Recoveries secretly, in such sort, that those in the Reversion could not have notice thereof, so as they could not before Judgement pray to be received, to remedy which mischief, the Statute of 32 H. 8. was made, by which all Recoveries had against Tenant by the Curtesie, or otherwise for life or lives, by agreement of the parties of any Lands whereof such particular Tenant is seised shall be void, as Tenant by the Curtesie, &c. should be void against him in the Reversion; and yet there was an evasion to creep out of that Statute; for such particular Tenants, would make a Feoffment with Warranty, and then the Feoffee should be impleaded in a Writ of Entry, and he vouch the Tenant for life, who would aver, and such Recovery was holden to be out of the Statute of 32 H. 8. For the Recovery was not against such particular Tenants, &c. For the remedy of which mischief, the Statute of 14 Eliz. was made, by which it is provided, That such Recoveries had where such particular Tenants are vouched shall be void, if such Recovery be by Covin betwixt them: And he conceived, That the forfeiture is not in respect of the Recovery it self, but of the Plea pleaded by the Tenant: And here in our Case, there is not any Covin found,

found, or that Sir William Pelham knew that he was but Tenant for life; but it is found, that this Recovery was with their assent, and that was lawfull as the case is; for they might agree to have such a Recovery for farther assurance: and so Sir William Pelham hath not vouched any but his Bargainor, and that according to their Covenants; and this Bargainor was not a bare Tenant for life, but he had also a Remainder in tail, although not immediately depending upon the Estate for life, which he had cut off; there it was not meerly a feigned Recovery: See 5 E. 4. 2. and 24 H. 8. br. Forfeit. 87. where Tenant for life being impleaded in a Præcipe, voucheth a stranger, the same is no Forfeiture, for the same doth not disaffirm the Reversion: but contrary of Aid prayer, for a stranger may release with warranty to Tenant for life, upon which he may vouch: And he reported in his Argument, That Bromley, Chancellor of England, sent him to both the chief Justices, to know their Opinions upon this point; and they were of Opinion, That the Voucher of a stranger was not any Forfeiture, and also that after the Recovery was executed, he in the Remainder could not enter; but they conceived, that the Right of him in the Remainder was not bound: And he said, That after the Recovery was executed, that he in the remainder could not enter: See 24 H. 8. Br. Forfeit 87. For if Entry in such Cases should be lawfull, infinite Suits would follow thereupon, which would be much to the Discredit of common Recoveries, which are now the Common Assurances of the Land. As to the objection of the Enfancy, the same will not help the matter. Br. Sav. Default 50. 6 H. 8. A Recovery had against an Infant, in which he voucheth and loseth, is not erroneous; contrary of a Recovery upon a default: And if an Infant, Tenant in tail, suffer a common Recovery, the same is a discontinuance, for in such Recoveries Infancy is not respected: And in a Scire facias upon a Judgment had against the Father, the Heir shall not have his age: And he cited a case out of Bendloe's Reports, 5 Eliz. Tenant for life, the Remainder over to a stranger in Fee, Tenant for life is disseised by Covin; in a Præcipe quod reddat against the Disseisor, he voucheth the Tenant for life, who enters into warranty generally, and voucheth over the common Voucher: It was adjudged, That the Recovery was out of the Statute of 32 H. 8. for the Recovery was not had against the particular Tenant, for he was but Tenant in Law, because Voucher; and also that the Recovery was a good bar to him in the remainder, notwithstanding that he was within age at the time of the Recovery.

And afterwards at another day the Case was argued by the Barons, and Clark Baron conceived, That the Entry of him in the remainder was congeable: It hath been said, That Sir William Pelham did not know that the Bargainor had an Estate but for his life, or that any other person had any remainder therein; the same is not to any purpose to excuse him: for 42 E. 3. Every Purchasor ought at his own peril take notice of the Estates and charges which are upon the Lands of which he is Purchasor; and the Law presumes that none will purchase Lands without advice of Counsel, and without knowing the Titles to the Lands. And although divers Statutes have been made to provide against the practices of particular Tenants, yet it is no argument, that no other remedy was before. And by Littleton, If Tenant for life joyneth the Mise upon the mere right, it is a forfeiture. And he held strongly, That the Judgment did not take away the Entry, cause of forfeiture being given before the Judgment: See 5 Ass. 3. and 22 Ass. 31. to that purpose: For where Tenant for life is impleaded, he ought to attend upon him in the reversion, and to expect instructions from him in defence of his Title, &c. And therefore if he maketh default, or confesseth Action, the same is a forfeiture: And as to the supposed recompence, the same shall not help this Case, for this is a common

recovery

recovery, and nothing else but an Assurance: And Recoverors they are but Assignees, and they shall take advantage of Conditions by 32 H. 8. and a Recoveror shall be seised to the use of him who suffereth the Recovery, if no other use be expressed. And he also held, That when Tenant for life bargains, and sells his Lands by Deed enrolled, although no Fee passeth, yet it is a forfeiture, and that by reason of the Enrolment, which is matter of Record. And he said that if an Infant, Tenant for life, be disseised, and the Disseisor dieth, and afterwards the Infant dieth, that he in the Remainder might enter.

Gent, Baron, argued to the same intent; and he said, That if Tenant for life suffereth a Recovery, the same is not simply a forfeiture, for he may have a warranty upon a Release or Confirmation made to him. Attornment doth not give a Right, but is onely a Consent, yet if he who hath not any thing in the Reversion will levy a Fine thereof unto another, and afterwards the Conusee brings a Quod juris clamat against the Tenant of the Land, and he attorn, it is a Forfeiture.

Manwood, Baron, to the same intent; this is a new Case, and I have not seen nor read the Case in any Book, nor seen any presidents; and it is a great case, and a general case, and worthy to be argued: And I conceive clearly, That here is a direct and express forfeiture: the Dignity of Judgments in reputation of Law hath been urged, which ought to stand in force until they be reversed by Error or Attaint: And also Littleton 481. hath been urged, where upon the Statute of West. 3. he saith, That before the Statute aforesaid, if a Lease had been made to one for life, the remainder to a stranger, and afterwards a stranger by faint Action hath recovered against Tenant for life by default, and afterwards the Tenant for life died, he in the Remainder had not any remedy: But there Littleton doth not report the same as his own Opinion, but as an Opinion conceived by a Reader upon the said Statute; and in truth it is but a meer conceit. And as to the main point, he took this difference; Such Recoveries in which the title of the Demandant stands indifferent to the Court, and non constat, if it be good, or not being suffered by Tenant for life by default or confession, without aid-prayer of him in the Reversion, do not make any forfeiture, although that the Tenant for life hath not dealt with him in the Reversion, not having prayed in aid of him: And in such case, if a Lease be made for life, the Remainder over in Fee, upon such Recovery he in the remainder shall have a Formedon in the remainder, or a Writ of Right, and shall not put out him who recovered, without any Action, and that by the common Law. Then came the Statute of West. 2. c. 3. which gave unto the Wife a Cui in vita, upon a Recovery had against the Husband by default, where before she had not any remedy, but onely Writ of Right: and notwithstanding, si ulterius quæratur, si necesse habet ostendere jus suum, secundum formam brevis quod prius impetraverat: And if his Right be not better than the right of him in the Reversion, he shall lose it, notwithstanding the Judgment given before for him: and that Statute gave Receipt, or Writ of Entry, ad terminum qui præteriit; and that Statute is to be intended of such Recoveries where a good Title or indifferent is, so as non Constat Curiæ, if it be good, or not? After that Tenant for life was driven unto a new shift, and would not make default, or lose for not pleading, but he would plead, but that faintly; for the remedy of which mischief, the Statute of 13 R. 2. which gave Receipt in such case; the particular Tenant being restrained by this Statute, he jugled yet, and practiled to suffer a Recovery secretly, without notice of him in the Reversion: for the remedying of which mischief, the Statute of 32 H. 8. was made, and that makes such Recovery had against such a particular Tenant void against him the Reversion.

It

It hath been objected, That the ſaid Statute of 32 H. 8. did not give any forfeiture in this caſe, but makes the Recovery void; and therefore he in the Reverſion ought to ſtay until after the death of the particular Tenant: To that I ſhall ſpeak after. But here our caſe is of a common Recovery, and it doth appear to the Court, that the Demandant hath not right, for the Tenant might have barred him: Alſo this Recovery is not to the uſe of the Recoveror, but to the uſe of him who was Tenant in it; and in truth it is nothing elſe but an aſſurance: and in theſe feigned Recoveries the Recoveror comes in under the Title of the Tenant to it, and not paramount, as in caſe of a Recovery upon a good Title. A Leaſe for years made by him who after ſuffers a Recovery is good, and ſhall not be defeated by the Recovery; otherwiſe it is where the Recovery is upon a good Title. See Statute of Gloceſt. cap. 11. where upon default of the Tenant, Receipt is given for Leſſee for years; yet if the Tenant vouch, upon default of the Vouchee the Leſſee for years ſhall be received; and now Receipt of Leſſee for years is out of the Book, for by the Statute of 21 H. 8. cap. 15. he may falſifie the Recovery: but no Receipt lieth in the caſe of a common Recovery, for that he who recovers cannot put out the Termor. As to that which my Brother Clark hath ſaid, That the bargain and ſale in this caſe is not any forfeiture, but when the bargain and ſale is enrolled, then it is a forfeiture; I am not of ſuch Opinion: for although that the Enrolment be of Record, yet the Deed is not of Record; for againſt a Deed enrolled, a man may plead Infancy, although none can plead Non eſt factum. Alſo he held, That although by the bargain and ſale, and the Enrolment of it, the Bargainee had not a fee, for by ſuch act the Reverſion is not removed; yet by the Recovery, and the Execution of it, the Bargainee hath gained a fee out of the Leſſor, for the Recovery is to the uſe of the Bargainee, againſt whom it was had. It hath been objected, that here is onely a Voucher, which paradventure was lawfull in this caſe, by reaſon of a warranty paramount, or of a Releaſe or Confirmation with warranty: and two Caſes have been vouched to that purpoſe, viz. 5 E. 4. 2. Tenant for life being impleaded in a Præcipe, voucheth a ſtranger, the Demandant counterpleads the Voucher, which is found for him, he in the Reverſion hath no remedy but a Writ of Right; ſo if the Vouchee had entred into the warranty, and loſt, &c. As to that book, we ought not to conceive, That every Caſe reported in our books is Law; but let us obſerve, of what authority that caſe is; truly it is the conceit of the Reporter himſelf, for he puts the Caſe, and reſolves the caſe, but no Judge or Serjeant is named in the caſe, &c. The other caſe is 5 E. 4. 2. b. Note by Heydon clearly. If my Tenant for life voucheth a ſtranger, who entreth into the warranty generally, and doth not know how to bar the Demandant, the Tenant ſhall recover in value, and the Reverſion of that which he hath in value ſhall be in me in lieu of my former Reverſion; as a Releaſe to the Tenant for term of life ſhall enure to him in the Reverſion: But that is but the Opinion of one Serjeant, &c. But I anſwer to theſe books, If the demandant in ſuch recovery hath a good Title, ſo as the Tenant or the Vouchee, as Heydon ſaith, do not know how to bar the Demandant, there ſuch Voucher of a ſtranger is no forfeiture, nor ſuch Recovery ſuffered upon it, for againſt his Will, volens nolens, he ſuffered it: but if the Tenant hath good matter to bar the Demandant, and no good cauſe of Voucher, nor any warranty, as the matter is in the caſe of a common Recovery, there the Voucher of a ſtranger, or ſuffering of a Recovery, is a forfeiture of his Eſtate. And here in our caſe if the Demandant hath not any Title, the Tenant or Vouchee hath not any warranty; but the Tenant might have barred the Demandant if he would: And he ſaid, That the Voucher onely doth not make the forfeiture, but rather the recovery; for when Judgment

is given, and Execution is had, then the Fee is plucked out of the Reverſioner: vide 6 R. 2. If Tenant for life claimeth a Fee, the ſame is a forfeiture: but here Sir William Pelham hath done more, for he hath gained Fee by the Judgment, therefore à fortiori it ſhall be a forfeiture. But let us ſee a little what meddlings or attempts by the particular Tenants are cauſes of forfeiture, and what not: 5 Aſſiſ. 3. A. brought a Writ of Entry againſt Tenant for life by Colluſion to ouſt B. of his Reverſion, ſuppoſing that the Tenant for life held of his Leaſe; the Tenant confeſſed the Action, upon which Judgment is given; B. enters, and his Entry adjudged lawfull, for this Recovery is adjudged in Law but an alienation to the diſinheritance of him in the Reverſion: and there it appeareth, that ſuch Recovery by Covin is but an alienation, and without any ſtrength of a Recovery. And he cited many other caſes cited before by Altham: 14 E. 3. Recept 135. where Tenant for life pleads in chief, and prays in aid of a ſtranger, where he might bar the Demandant, and would not, the ſame is a forfeiture: Alſo 2 E. 3. 2. and 27 E. 3. where Tenant for life, in a Quid juris clamat, attorned to the Conuſee upon a Fine levyed by him that had not any thing in the Land, the ſame was a forfeiture, and yet the Attornment doth not deveſt the Reverſion out of the Leſſor: 50 E. 3. 7. and 8. Land was given by Fine in tail, the Remainder over to a ſtranger in fee, the Donee took a Wife and died without iſſue, the Wife accepted Dower aſſigned by a ſtranger, he in the remainder brought a Scire facias againſt the Wife; ſhe is Tenant in Dower of the aſſignment of a ſtranger, and pleads to the Title; the Demandant recovereth, ſhe hath loſt her Dower, for ſhe hath not pleaded as ſhe ought, being a particular Tenant, &c. H. 4. Tenant for life loſeth his Land in a Recovery againſt him againſt his Will, and thereupon brings Quod ei deforceat, and declares upon an Eſtate-tail, and recovers, the ſame is a forfeiture, becauſe he hath challenged a higher Eſtate than he had. 5 H. 5. Tenant for life joyns the Miſe upon the meer right: 2 H. 6. Leſſee for years being ouſted, brings an Aſſiſe, and recovers: 1 H. 7. Accepts a Fine of a ſtranger upon condition come ceo, &c. all theſe are forfeitures. In the principal Caſe here, the Tenant who ſuffers his Recovery doth not plead at all to defend the Right: but whereas he might have barred the Demandant, he giveth ſtrength to his pretended Title, and makes it a perfect Title; and by ſuffering this Recovery and Judgment to paſs upon it, he hath taken the Reverſion out of the Leſſor to whom he owed Fealty, and therefore he ſhall forfeit his Eſtate. And without any doubt it is apparent to the Court, that the Demandant in this Recovery hath not any Title, but the Recoverors in ſuch caſes are but as Aſſignees or Purchaſors, which appears by the Statute of 7 H. 8. ca. 2. which gives Diſtreſs and Avowry to Recoverors, &c. As to the inventing of Recoveries, it was a neceſſary device, for it was to take away Eſtate-tails, which were the cauſes of great miſchiefs and inconveniencies in this Realm: and there was great reaſon for it; for Tenant in tail might by the common Law alien his Lands poſt prolem ſuſcitatam, and now he hath an Inheritance, and may do Waſte, But he was ſo reſtrained by the Statute of Weſt. 2. that all the Realm, and the Subjects in it, were inveigled thereby; Joyntures of Wives, Leaſes of Farmors, Mortgages to Creditors, Statutes, and other Aſſurances, were defeated by the deaths of Tenants in tail, which was both againſt the common Law, and alſo againſt all Conſcience. Theſe matters coming to the knowledge of the Juſtices, and the miſchiefs thereupon following being very frequent, and it appearing that the Tenant in tail was a dangerous fellow, and that there was no ſafe dealing with him, they took conſideration of them: and conſidering alſo with themſelves, That Lineal Warranty and Aſſets, and Collateral Warranty without Aſſets, did bar the Entail,

Entail, upon this conſideration they grounded the practice and uſage of common Recoveries. So as by that means Tenant in tail, hath Poteſtatem alienandi, as he hath at the Common Law; and by this means, right was done to the Common Law becauſe its authority was reſtored; and thereby injury was done to no man: But as for Tenant for life, he never had Poteſtatem alienandi. And as to that which hath been ſaid, That the recovery ſhall ſtand in force untill after the death of Tenant for life; and in our Caſe here, Tenant in tail is alive; Truly, if the Law ſhould be ſuch, great miſchiefs would follow: For then great Jointreſſes, the Widows of great perſons, having aſſurances to them of great and ſtately Houſes, and of Lands furniſhed with Timber, of great yearly value, might ſuffer ſuch Recoveries; and ſo having plucked the Fee out of the Heirs, might commit waſte, and the ſame ſhould be diſpuniſhable, which would be an intolerable miſchief; and ſo he concluded, that the ſuffering of a Recovery was a forfeiture, and Judgment, Trin. 21 Eliz. was given, and entred accordingly.

*Trin.* 31 *Eliz.* In the Exchequer.

## XC. Noon's *Caſe.*

DEBT was brought in London, againſt one as Executor, and upon fully adminiſtred pleaded, it was found for the Plaintiff, who aſſigned the ſame to the Queen, whereupon a Scire facias iſſued out of the Exchequer againſt the Defendant, into the County of Dorſet, The Sheriff returned Nulla bona, &c. which Scire facias was upon a Conſtat of goods in another County; It was agreed by all the Barons, that the Debt was well aſſigned to the Queen: And alſo that the Scire facias might iſſue forth of another Court, than where the Record of the Judgment remained; and that upon a Conſtat of goods, in another County than where the Writ is brought, or where the party is dwelling, he may well have a Scire facias in another County. But the Return was challenged, becauſe contrary to the verdict: As in a Replevin, No ſuch beaſt, is not a good Return, but Averia elongata; or Nullus venit ex parte querentis ad monſtrand. averia: And here the Sheriff might have returned, Devaſtavit, which well ſtands with the Verdict, 5 H. 7. 27. But as to that, it was ſaid by the Barons, That it is true, that the Sheriff of the County where the Writ was brought, is concluded by the Verdict, to make any return contrary to it; but the Sheriff of another County ſhall not ſo be; but the Sheriff of the County where the Writ is brought ought to return Devaſtavit, &c. and thereupon the Plaintiff ſhall have Proceſs into another County; But the Queſtion farther was: If a Scire facias upon Teſtatum ſhall iſſue into another County, before that the Sheriff of the County where the Writ is brought, had returned a Devaſtavit? for ſome conceived, That a Devaſtavit where the Writ was brought, ought firſt to be returned, and then upon a Teſtatum, Proceſs ſhould iſſue forth into any County within England; But others were of opinion, That without a Devaſtavit returned upon a Teſtatum, Proceſs might be ſued forth immediately into any other County. Williams ſaid, If I recover goods by Action brought in Midd. I may upon a Teſtatum, have a Capias into any foreign County.

*Trin.* 31 *Eliz.* In the Exchequer.

## XCI. Weſtern *and* Weild's *Caſe.*

IN a Writ of Accompt brought in London, the Defendant pleaded, Never his Receiver, &c. which was found for the Plaintiff, and Judgement given, that the Defendant ſhould accompt; Afterwards the Defendant brought his Writ of Privilege; and if the ſame ſhould be allowed after Judgment? was the Queſtion: Coke, It ſhall be allowed, for the Defendant hath not forceaſed his time. This Judgement to accompt is not properly a Judgment, for no Writ of Error lieth upon it before the accompt be ended: Manwood, Regularly, after Judgment, no privilege ſhall be allowed, but that is to be intended of a Judgment ended; but here, notwithſtanding this Judgment, the Action is depending, and therefore he conceived that the privilege ſhould be allowed in this caſe. It was objected, That then the Plaintiff ſhould be at great miſchief, for he ſhould loſe the advantage of his Trial; for he muſt begin again, and plead again, and have a new Trial. Clark, the Plaintiff ſhall have benefit of his former Trial by way of Evidence.

*Trin.* 27 *Eliz.* In the Common-Pleas. *Rot.* 1353.

## XCII. Brian *and* Cawſen's *Caſe.*

3 Len. 115. IN an Action of Treſpaſs by Brian and his Wife, and others, againſt Cawſen; That William Gardiner was ſeiſed in Fee, according to the cuſtome of the Manor of C. of certain Lands, and ſurrendred them to the uſe of his laſt Will; by which he deviſed them in this manner; i. I bequeath to John Th. my Houſe and Land in M. called Larks and Sone: To Steph. Th. my Houſe and Land, called Stokes and Newmans, and to Roger Th. my Houſe and Lands, called Lakins and Brox. Moreover, If the ſaid John, Stephen or Roger, live till they be of lawfull age, and have iſſue of their bodies, lawfully begotten, then I give the ſaid Lands and Houſes to them and their heirs in manner aforeſaid, to give and ſell at their pleaſure; but if it fortune one of them to die without iſſue of his body, lawfully begotten, Then I will that the other brothers, or brother, have all the ſaid Houſes and Lands in manner aforeſaid: and if it fortune the three to die without iſſue, in like manner, Then I will, that all the ſaid Houſes and Lands be ſold by my Executor, or his Aſſigns, and the money to be given to the poor: The Deviſor dieth; John, Stephen and Roger are admitted according to the intent of the Will, Roger dieth within age, without iſſue, John and Stephen are admitted to his part, John comes of full age, and hath iſſue, J. and ſurrenders all his part of the whole, and his Eſtate therein,, to the uſe of Stephen and his heirs, who is admitted accordingly; Stephen comes of full age, John the father dieth, Stephen dieth without iſſue, John the ſon, as coſin and heir of Stephen is admitted, according to the Will, and afterwards dieth without iſſue, The Wives of the Plaintiffs are heirs to him, and are admitted to the ſaid Lands, called Larks and Sone, and to the moyety of the Lands, called Lakins and Brox, parcell of Lands where, &c. by force whereof they enter into all the Lands where the Treſpaſs is done, and it was found, That A. ſole Executor, died inteſtate, and that Cawſen the Defendant is coſin and heir of the Deviſor, and that he as heir, entred, and did the Treſpaſs. Firſt, it was agreed by all, That by the firſt words of the Will, the three Deviſees had but for their lives. But

Fenner

Fenner and Walmeſley, who argued for the Plaintiffs conceived, that by force of the latter words (ſcil.) If the ſaid John, Stephen and Roger, live till they be of lawfull age, and have iſſue of their body, lawfully begotten, Then I give the ſaid Lands and Houſes to them and their heirs, in manner aforeſaid, &c. that they have Fee; and the words (in manner aforeſaid) are to be referred, not to the Eſtate which was given by the firſt words, which was but for life, but to make them to hold in ſeveralty, as the firſt Deviſe would, and not jointly, as the words of the ſecond Deviſe do purport: And Fenner ſaid, It had been reſolved by good opinion, That where a Fine was levied to the uſe of the Conuſee and his Wife, and of the heirs of the body of the Conuſor, with divers Remainders over, Proviſo, That it ſhould be lawfull to the ſurvivor of them, to make Leaſes of the ſaid Lands in ſuch manner as Tenant in tail might make by the Statute of 32 H. 8. Although thoſe Lands were never deviſed before the Fine, yet the Wife ſurvivor, might demiſe them by force of the Proviſo, notwithſtanding the words in manner, &c. So if Lands be given to A. for life, upon condition, the remainder to B. in manner aforeſaid; theſe words, in manner aforeſaid, ſhall refer unto the Eſtate for life limited to A. and not to the Condition, nor to any other collateral matter. The words, If they live untill they be of full age, and have iſſue, are words of Condition, and ſhall not be conſtrued to ſuch purpoſe, to give to them by implication an Eſtate tail; for the words ſubſequent are, That they ſhall have to them and their heirs, to give and ſell at their pleaſures, by which it appeareth, that his intent was not to make an Eſtate tail; for Tenant in tail cannot alien or diſpoſe of his Eſtate, &c. And as to the latter words, And if it fortune they three to die without iſſue, &c. theſe words cannot make an Eſtate tail, and the expreſs limitation of Fee in the former part of the Will, ſhall not be controlled by implication, out of the ſubſequent words: As if Leſſee for fourty years deviſeth his term to his Wife for twenty years, and if ſhe die, the remainder of the term to another, although ſhe ſurvive the twenty years, ſhe ſhall not hold over. And here, the ſecond ſale appointed to be made by the Executor, ſhall not take away the power of the firſt ſale allowed unto the Deviſees after iſſue. Snagg and Shuttleworth, Serjeants, to the contrary: And they ſaid, that the Defendant hath right to two parts, for no Inheritance veſteth in the Deviſees until full age and iſſue; and becauſe two of the Deviſees died without iſſue, they never had an Inheritance in their two parts, and ſo thoſe two parts do deſcend to the Defendant, as heir to the Deviſor, no ſale being made by the Executor; Theſe words, If John, Stephen and Roger, are to be taken Diſtributive, viz. If John live, &c. are to be taken Diſtributive (ſcil.) If John live untill, &c. he ſhall have Inheritance in his part, Et ſic de reliquis: As if I have right unto Lands which A. B. and C. hold in common, and I by Deed releaſe unto them all, the ſame ſhall inure to them ſeverally, 19 H. 6. And here, theſe latter words, If they three die without iſſue, it ſeems to be but an Eſtate tail: See to that purpoſe, 35 Aſſ. 14. 37 Aſſ. 15. For a man cannot declare his intent at once, but in ſeveral parts; all which make but one Inheritance, and ſo it is ſaid by Perſay, 37 Aſſ. 15. we ought to adjudge upon all the Deed, and not upon parcell. And ſee Clatche's Caſe, 16 Eliz. Dyer 330, 331. And it was ſaid, That if I give Lands to one and his heirs, as long as J. S. hath heirs of his body, the ſame is a Fee-ſimple determinable, and not an Eſtate tail, Quære of that. Then here the Fee-ſimple is determined by the death of the Deviſees without iſſue, and therefore the Lands ſhall revert to the heir of the Deviſor, eſpecially there being no perſon in rerum natura, who may ſell, for the Executor before any ſale by him made, died inteſtate; and if he had made Executors, yet the Executor of the Executor could not ſell, which ſee, 19 H. 8. 9, 10. And afterwards, the Juſtices reſolved, That no Eſtate tail is created by the Will, but that the Fee-ſimple is ſettled in them when

when they came to their lawfull age, and have iſſue; ſo as the reſidue of the Deviſe is void: And Judgment was given for the Plaintiffs.

## XCIII. *Hil.* 29 *Eliz.* in the Common Pleas.

THE Caſe was this, (viz.) By the Civil Law the Parſon ought to have his Tythe by the tenth Ridg: And in a great Field there was Corn upon the Arable Land, and Graſs upon the Head Lands; and in a Suit for Tythe Hay, and Rakings of the Corn, the Defendant did preſcribe, to pay the tenth Shock of Corn for all the Corn, Hay and Rakings of the Corn; and the Preſcription was challenged not to be good, for it is upon the matter a Preſcription of Non Decimando, for the tenth Shock is due of common Right, and ſo nothing is for the Hay and Rakings: It was holden by all the Juſtices, That for tying of Horſes upon the Head Lands, and eating of the Graſs and Corn together, that the Preſcription was good: But the doubt was, when the Graſs is made into Hay, which is upon the Head Lands, If it be a good Preſcription then, and diſcharge for the Hay, becauſe it is another thing than what is growing upon the Land? But in the end all the Juſtices agreed, That by the Civil Law (ut ſupra) the tenth Ridg is due for Tythe Corn; therefore for the reaping, binding and ſhocking, it is a reaſonable Preſcription, that the party ſhall have the Hay upon the Head Lands in recompence of the ſaid other things, and the Hay upon the Head Lands is but of little value.

Roll. 646.

1 Cro. 446. 475.

## XCIV. 29 *Eliz.* Challoner *and* Bowyer's *Caſe.*

IN Aſſiſe of Novel Diſſeiſin by Challoner againſt Bowyer, it was given in Evidence at the Aſſiſe, That William Bowyer was ſeiſed, and having iſſue two Sons, and two Daughters, deviſed his Lands to his younger Son in tail, and for want of ſuch iſſue, to the Heirs of the body of his eldeſt Son; and if he die without iſſue, that then the Land ſhall remain to his two Daughters in Fee: William Bowyer dieth, the younger Son dieth without iſſue, living the eldeſt Son, having iſſue him who is Tenant in the Aſſiſe: It was moved, That notwithſtanding that by way of Grant, the Son, living his Father, cannot take as heir, i. by limitation, as Heir to his Father, becauſe that none can be ſaid or held Heir to his Father as long as the Father be alive; yet by way of Deviſe the Law ſhall favour the intention of the party, and the intent of the Deviſor ſhall prevail. But all the Court was ſtrongly againſt it, and held, that as well in Caſe of Deviſe, as of Grant, all is one. Whereupon the Tenant produced Witneſſes, who affirmed upon their Oaths, That the Deviſor declared his meaning concerning the ſaid Will, That as long as his eldeſt Son had iſſue of his body, that the Daughters ſhould not have the Land: but the Court utterly rejected the matter; and Judgment was given for the Plaintiff.

29 *Eliz.* In the Exchequer.

## XCV. *the Counteſs of* Linnox *Caſe.*

IN this Caſe it was ſaid by Manwood chief Baron, That whereas the Ciſtercians, &c. had a Privilege, that they ſhould not pay Tithes for their Lands, quas propriis manibus excolant, but their Fermors ſhould pay Tithes: and now by the Statute of 31 H. 8. they are diſſolved, That the Queen and her Fermors ſhould be diſcharged of ſuch Tithes as the ſpiritual perſons were: for the Queen cannot excolere; ergo, her Fermors ſhall be diſcharged: and ſo long as the Queen hath the Freehold, her Fermors ſhall have ſuch Privilege, although ſhe Leaſeth for years, or at Will: But if the Queen granteth over the Reverſion, then the Fermors ſhall pay Tithes. More Rep. 915.

*Mich.* 29 *Eliz.* In the King's- Bench.

## XCVI. Golding's *Caſe.*

IN an Action upon the Caſe againſt Gloding, the Caſe was; A Feme ſole, being Tenant for life by Deviſe of Lands, Leaſed the ſame for years, to begin after her death; and afterwards made another Leaſe, 18 Octob. for twenty one years to the ſame Leſſee, to begin at Michaelmas before; and the Pleading was, Virtute cujus quidem dimiſſionis: and the Leſſee entred Craſt. Sanct. Mich. which was before the making of the Leaſe: And upon the Grant of theſe two Leaſes, the conſideration of Aſſumpſit was grounded in an Action of the Caſe thereupon, and ſix hundred pounds damages given: And now this was moved in Arreſt of Judgment. 1 Len. 296. 1 Cro. 50. Noy 18.

Coke for the Plaintiff; Where two Conſiderations are laid down in the Declaration, although that the one be void, yet if the other be ſufficient, the Action upon the Aſſumpſit lieth, and damages ſhall be taken accordingly. And the Grant upon the Aſſumpſit was, That both the Leaſes ſhould be aſſigned to the Defendant; and the Plaintiff hath declared accordingly, although that one of the Leaſes be void: And the Agreement was, That the Plaintiff ſhould aſſign totum ſtatum, titulum, & intereſſe ſuum quæ habet in, &c. It appears here in the Pleading, That the Leaſe was made the eighteenth of October, and the Leſſee did enter, and was thereof poſſeſſed, Craſt. Mich. which was before, and ſo the Leſſee then entering was a Diſſeiſor, But by Coke, the ſame is not a Diſſeiſin, although that the Leſſee entreth before the Leaſe made; for there was a communication of a Leaſe, although the Leaſe was not made before the eighteenth of October; and peradventure it was by aſſent of the Leſſor, in which caſe it cannot be a Diſſeiſin: but be it a Diſſeiſin, yet in as much as he hath aſſigned all his intereſt, quod ipſe tunc habuit, the Conſideration is anſwered; and he hath alſo delivered both the Indentures of Demiſe, and hath granted all that which he might grant; be ſuch Grant void or good, it is good Conſideration enough as to us.

Egerton, Solicitor, contrary; In every Action upon the Caſe upon a Promiſe, there are three things conſiderable, Conſideration, Promiſe and Breach of Promiſe; As to the Conſideration in our Caſe, the Grant of the Leaſe, which is to begin after the death of the Leſſor, is merely void? And as to the ſecond Conſideration, it appeareth, That the Leſſor at the time of the making of the Leaſe

Leaſe had but a Right, for he was diſſeiſed; for he who was afterwards the Leſſee entred before he had any Leaſe made unto him; and ſo here is not any conſideration to ground the Aſſumpſit upon: But admit that there be a conſideration, yet the Action doth not lie: For 19 Eliz. a difference was taken by the Juſtices, (ſcil.) When in the Declaration in an Action upon the Caſe, two or more conſiderations are laid, and are not collateral, but purſuant: As if I owe you an hundred pounds, and I ſay, That in conſideration that I owe you 100 l. and in conſideration that you ſhall give me 10 l. I promiſe to pay unto you the ſaid hundred pounds which I owe you: If you bring an Action upon the Caſe againſt me for the hundred pounds, and lay in your Declaration both conſiderations, although you do not pay me the ten pounds, yet the Action lieth: But where the conſiderations are not purſuant, but meerly collateral, and do not depend the one upon the other, As in conſideration that you are of my Councel, and you ſhall ride with me to York, I promiſe to give to you an hundred pounds; there both conſiderations ought to be performed, or otherwiſe the Action doth not lie: and ſo here in the principal Caſe, the conſiderations being collateral, they both ought to be performed. Afterwards, upon conſideration had of the Caſe by the Court, Judgment was given for the Plaintiff: and it was ſaid by Coke, That there was not any Diſſeiſin in the Caſe, but he who entred was Tenant at ſufferance, by reaſon of the precedent communication.

*Trin.* 28 *Eliz.* In the King's-Bench.

## XCVII. Curtiſe *and* Cottel's *Caſe.*

THE Caſe was this, That one Bonham was ſeiſed of a Manor, within which there were divers Cuſtomary Lands demiſable by Copy for three lives: The Lord of the Manor did demiſe ſome of thoſe Lands to three Siſters, Habendum to them for their lives ſucceſſive, for the Fine of 100 l. by them paid; and they being ſeiſed accordingly, the eldeſt Siſter, who was Tenant in poſſeſſion, took to Husband one Chapman; after which the ſaid Lord by Indenture leaſed the ſame Land to the eldeſt Siſter, the Remainder to the Husband, the Remainder to the ſecond Siſter, and no Agreement was made thereunto by the ſecond Siſter by Deed, before or after the making of the Indenture; but four days after the Leaſe made ſhe agreed to it in the Country, and then took to Husband Curtiſe, and they entred, claiming the ſaid Land, upon which Entry the Action was brought: The point was, That when the Leaſe by Indenture was made to the eldeſt Siſter, at which time no agreement was made by the ſecond Siſter who was in Remainder; yet when after ſhe agreed, If by that Agreement her Right to the Copihold were extinct, or not? ſo as the intereſt of the eldeſt Siſter being gone by the acceptance of the Eſtate by the Indenture, the ſecond Siſter might come and claim her cuſtomary intereſt, as it were paramount the intereſt of the eldeſt Siſter, which ſhe claimed by the Indenture.

Glanvil, The cuſtomary intereſt of the eldeſt Siſter is extinct upon this matter, by reaſon of her agreement to it afterwards. Where an Eſtate is given to one by a lawfull act, it ſhall be adjudged in the party before agreement, until it be diſagreed unto; and if the party do once agree, he cannot afterwards diſagree unto it. If an Eſtate be lawfully made to a Copyholder but for years, his whole intereſt in the Copyhold is determined: and that a Freehold cannot be waived in pais, but onely by

by matter of Record: See 13 R. 2. Joynt-tenants 13. A Charter of Feoffment was made to four, and Seisin was delivered to three of them in the name of them all; and afterwards the fourth Feoffee came and saw the Deed, and said, That she would not have any thing in the Lands, but altogether disagree unto it; and it was, that that disagreement by word in pais did not devest the Freehold out of her: But when the party doth disagree in a Court of Record, there the Freehold is out of the party ab initio; and if he once agree, he shall not disagree afterwards. See Littl. Sect. 648. Tenant in tail enfeoffeth his Son and Heir apparent, and another, and Livery and Seisin is made to the other, according to the Charter of Feoffment, in the name of the Son also, the Son not knowing of it, nor disagreeing to the Feoffment; the other Feoffee dieth, the Son neither occupies the Lands nor takes the profits of them during the life of his Father; the Father dieth, the same is a Remitter to the Son, because the Freehold is cast upon him, and there is no default in him, and therefore he is remitted: But upon an illegal act is otherwise; for if A. disseise B. to the use of C. in such case nothing is in C. before an express Agreement, for the Disseisin was an unlawfull act. And in this Case at Bar, it doth not appear that the eldest Sister is dead, and therefore the Right of the second Sister cannot now come in question.

Shute, Justice, If the second Sister, at the time of the making of the said Indenture, had agreed unto it, then it had been a full extinguishment, but by an agreement afterwards it is not good.

Gawdy, Justice, The remainder is in consideration of the Law; and the Estate of the first Sister is not so determined, that any can take advantage of it; for the Lord, against this Lease by Deed indented, cannot enter, or claim any thing: and the second Sister, although she hath not agreed, yet she cannot enter during the life of her elder Sister, for her Remainder takes effect in possession after the death of her said Sister. But if any should take advantage of it, it should be the Lord, if his Deed indented did not stand against him. And afterwards Judgment was given against the younger Sister.

Clench, Justice, was of another Opinion, viz. That the Entry of the younger Sister, notwithstanding that her elder Sister was alive, was lawfull: Quære of that.

*Trin.* 28 *Eliz.* In the King's-Bench.

## XCVIII. Wellock's *Case*.

A Parson, in consideration of twelve pence, granted to one of his Parishioners, That he should hold his Lands discharged of Tithes: It was holden by the whole Court, That the same was no good Discharge, being without Deed, as a Lease of his Tithes. But it was holden, If the Parson afterward sueth the Parishioner for Tithes against the same Grant and Promise, the Parishioner may have an Action upon the Case against the Parson upon his Promise, although he cannot plead the Grant as a Lease.

*Trin.* 28 *Eliz.* In the Common Pleas.

## XCVIII. Lawſon *and* Hare's *Caſe*.

3 Len. 178. A Replevin by Lawſon againſt Hare, who avowed for a Leet Fee; and ſhewed how that he, and all thoſe whoſe Eſtate he hath in the Hundred of C. have uſed to hold a Leet, once every year; and that at each time, when ſuch Leet hath been holden, the Inhabitants within the ſaid Leet have uſed to pay to the Lord of the Leet 16 d. for a Leet Fee; and that the Lords of the ſaid Leet have uſed to diſtrain for the ſame: and ſhewed farther, that 5 Julii 26 Eliz. he held there a Leet, &c. The Plaintiff replied, Abſque hoc, that they had uſed to diſtrain; and iſſue being joyned, it was found for the Defendant. It was moved in Arreſt of Judgment, becauſe, that the Defendant had entitled himſelf to a Leet, by an Eſtate in the Hundred, and did not ſhew a Deed of it, which was ſaid, he ought to have done; as is 11 H. 4. 48. And of ſuch opinion was Anderſon and Windham, Juſtices. Periam and Rhodes Juſtices, contrary, as this caſe is, and that the Avowant need not ſhew a Deed, But if the hundred it ſelf had been in queſtion, then a Deed ought to have been ſhewed; But here the Avowant entitles himſelf to one thing, (ſcil.) a Leet, and a Leet Fee, by reaſon of the Hundred, and it is ſufficient for him to ſay, That he is ſeiſed of the Hundred, &c. although it be by diſſeiſin: for if he hath poſſeſſion of the Hundred, be it jure, vel injuria, he ſhall have alſo all things incident thereunto, for the poſſeſſion of the Hundred draws to him the Leet, and the Leet, the Leet Fee. But admit in this caſe a Deed ought to be ſhewed, we are to ſee if the ſame be helped by the Statute of Jeofailes, which extends to defaults in form in Writs, Original or Judicial Counts, Declarations, Plaints, Bills, &c. 18 Eliz. cap 14. and ſuch defects are thereby helped. And by Anderſon, although that the Avowant be Quaſi an actor, yet in Rei veritate, he is Defendant: For although that he is to have return of the Cattel, if it be found for him, yet he who ſueth the Replevin is the Plaintiff, and if the Defendant will juſtifie the diſtreſs, and not avow, he is meerly Defendant, and not a Plaintiff, or Actor, no more than in a Præcipe quod reddat, The Tenant voucheth and recovereth in value, he cannot be ſaid Plaintiff, or Defendant, and the Avowant cannot be Nonſuit, as the Plaintiff. But Windham and Periam were of a contrary opinion; For Avowry is in lieu of a Declaration, and the Plea of the Plaintiff to the Avowry, is not called a Replication, but a bar to the Avowry. But admit the Avowry be within the Statute, then if the Statute of Jeofailes there extend to help it? And Anderſon conceived that it did: But the Plaintiff might have demurred upon the Avowry for the not ſhewing the Deed, and Judgment ſhould have been given for him; but when he hath traverſed, and the iſſue found againſt him, now it ſhall be intended, that Avowant hath a Deed, although he hath not ſhewed the ſame. Another Exception was taken, becauſe it is ſaid in the Avowry, That the ſaid Leet was holden 5 Julii, and then it was void: For the Statute of Magna Charta, cap. 35 requires, that Leets be holden within one Month after Michaelmas and Eaſter; But that Exception was not allowed: For by Anderſon, Windham and Rhodes, by force of the Preſcription, The Lord might hold his Leet what day he pleaſed, and that his Liberty is not reſtrained by the Statute; and ſuch is the common experience: for the ſame Statute provides for it, (ſcil.) Quod quilibet habeat libertates ſuas quas habuit, & habere conſuevit tempore Regis H. avi noſtri, vel quas poſtea perquiſiret: And by Rhodes, the ſaid Statute doth not extend but to the Sheriffs Towns, and not to other Leets, which ſee Br. Leets, 23.

1 Cro. 217. 245.

upon

upon the Caſe of 8 H. 7. 1. which was affirmed by him to be good Law; Contrary by Periam, but he granted, that if a Leet hath uſed to be holden at one day certain, other than that which is limited by the ſaid Statute, the ſame may ſo continue, notwithſtanding the Statute, for ſuch Liberty is ſaved by the Statute. And by Anderſon and Rhodes; If the King grant to one a Leet to hold Semel quolibet anno, and doth not ſay, Ad libitum of the Grantee, yet the Grant is good, and the Grantee may hold it at what day he will.

13 *Eliz.* In the Exchequer-Chamber, *Error.*

## C. Goore *and others againſt* Dawbeny.

A Writ of Error was brought in the Exchequer-Chamber by Goore and Goore, Swinnerton and Tedcaſtel, againſt Dawbeny, of a Judgement given againſt them in the Court of Exchequer, in an Action upon the Caſe, in the nature of a Conſpiracy brought by Dawbeny, &c. who declared, That Goore and Goore, were joint Merchants of a ſtock of many wares, in moyeties tranſported in Barbary, and Swinnerton and Tedcaſtel were their Factors, and Dawbeny and the Goores were alſo joint Merchants intire of Merchandizes tranſported, &c. And the ſaid Swinnerton and Tedcaſtel were their Factors therein; and that was to merchandize for two years; and ſhewed farther, That the ſaid Plaintiffs did conſpire againſt the ſaid Dawbeny (See the Declaration in the Number Roll, for I could not take it in brief.) Coke of Councill with the Plaintiff aſſigned the Errors; becauſe Dawbeny in his Declaration hath declared, that they were joint Merchants (ſcil.) the now Plaintiffs, and have conſpired againſt him, and hath not ſhewed the place where they were joint Merchants, or where they were made joint Merchants, and that is iſſuable, although it be not the principal thing in the Declaration; for that is the fraud: As where Debt is brought for Rent reſerved upon a Leaſe for years the principal matter is the Debt, and the principal Iſſue is Nihil debet; Yet the Demiſe is iſſuable, and Non dimiſit is a good Plea: And here the Defendant by the Plea of Not guilty, hath not loſt the advantage of Exception aforeſaid. And he cited a great Caſe lately adjudged betwixt Stanſam and Matthew, in an Action upon the Caſe, conceived upon the Trover of a Bond and the Converſion of it to his uſe; The Defendant pleaded, Not guilty, and it was found againſt him; And becauſe in the Declaration there was not any place of the Converſion, Judgment was ſtayed. Here in the Declaration are two things, Firſt, the Conſpiracy, Secondly, the execution of it, , for the one without the other will not maintain the Action, but here the Conſpiracy is not purſued, nor executed according to that which is laid to be conſpired. The Conſpiracy is laid, That the Factor upon his account demanded 4000 l. of Barbary money, per nomen bona & denariorum ſummas, and the Execution is laid, That he demanded in allowance of wares delivered to Iſaac Abeſs: And he took a general rule, That a Commander ſhall never be charged, but where his Commandment is ſtrictly and preciſely purſued. Barbary money is included in this word Bona, for it is not current in England: See as to the purſuing of the Commandment; Sanders and Archer's Caſe, Plow. 18 Eliz. 437. And in our Caſe, he not onely puts the thing, but alſo the perſon, for the Conſpiracy is that he demanded allowance for goods delivered to Iſaac, and his four ſons, for Iſaac. In the one Caſe it is pretended, That Iſaac and four ſons are Debtors; and in the other Caſe Iſaac onely: Alſo here Dawbeny hath allowed and accepted the accompt of the Factors, againſt which he cannot have this Action; for it is

ignorantia craſſa, idque facti, quæ non excuſat: Alſo upon ſuch incertain demand as is laid in the Declaration, Dawbeny was not holden to make allowance: i. for ſo much wares upon a certain bargain made with Iſaac; and that was not a lawfull demand, and upon ſuch uncertain demand, he was not bound to make allowance; Et hoc modo eſt ignorantia juris quæ non excuſat omnino. Alſo here Swinnerton onely accompts and demands allowances, and Swinnerton onely was not Factor, but alſo Tedcaſtel, and therefore Dawbeny was not bounden to allow that accompt to Swinnerton, no more than to a mere ſtranger: And alſo Dawbeny alone was not to make allowance, for the two Factors were accomptable to him, and to Goores alſo. And ſo allowance by one of them to whom they are accomptable, is not good. One Executor (where the power is committed to two) ſells the Land, the ſale is void, and two joint Attorneys, &c. one onely can doe nothing: And here in this Declaration, it is many times alledged, that they were conjunctim Mercatores, conjunctim Factores; But I confeſs, that one joint Factor, with the expreſs conſent of his companion, may accompt alone; and ſo of the other, one may by expreſs conſent take an Accompt onely. One Factor is no Factor where there are many joint Factors; and in our Caſe, the two Goores and Dawbeny ſaw the accompt, but Dawbeny onely allowed of it, and that is not good: As if two Arbitrators are, and one onely makes the award, although both hear the matter. 14 E. 3. Fitz. Acc. 72. That the one Accomptant cannot accompt without his companion; but there Parn ſaith, That it had been adjudged, 6 E. 3. that the one might accompt without the other: See 41 E. 3. 3. & 9. Tamworth's Caſe. Tanfield contrary: As to the firſt Error, it is but conveyance and matter of inducement to the fraud and conſpiracy, which is the principal point of the Action; and therefore needeth not to be ſo preciſely alledged: and alſo by the general iſſue, they have paſſed the advantage of it, and all the ſpecial matter of the Count is contained in the general iſſue; for not guilty, goes to all, and includes the whole. Alſo upon the matter, the Jury hath found that they were joint Merchants; and although they were joint Factors, and the one onely hath accompted, yet the ſame accompt is good enough, for it was made with the conſent of the other, as appeareth by the Declaration. Conſpiraverunt, & agreaverunt, that Swinnerton in his accompt, peteret allowance, &c. ſo there was conſent to take the accompt, &c. and 6 E. 3. it is adjudged ut ſupra. And that the one joint Factor may accompt without his companion, is the Law of Merchants; for Factors are oftentimes diſperſed, ſo as they cannot be both preſent at their accompts, and ſo it hath been heretofore allowed in the King's-Bench: And as to that that Dawbeny onely hath given allowance to this accompt, the ſame is good enough: If I promiſe to two to doe any act, the one of them may diſcharge me from it, and that by word, for it is but a perſonal thing: Two joint-tenants of a Manor grant the Stewardſhip thereof to one, and 20 l. per ann. for the exerciſe of it; if the one diſcharge him, it is a good diſcharge as to the ſervice, but yet he ſhall have his Fee: If the Lord of the Manor grant the Stewardſhip thereof to another, taking 10 l. per ann. of the iſſues and profits of his Court there for his Fee: and afterwards the Lord diſchargeth the Steward, the ſame is void; for it is a diſadvantage to the Steward, for he cannot have his Fee, if no Courts be holden; but if the Fee be limited to iſſue out of Lands, there ſuch diſcharge is good; for there the Steward ſhall have his Fee although that no Courts be holden there, See 18 E. 4. 8. to that purpoſe. Egerton, Solicitor, to the contrary; although (as hath been objected) the matter of joint Merchant be but matter of inducement, it is notwithſtanding material, and without it the Action will not lie: In Debt, upon Arbitrament, The Plaintiff in his Declaration, ought to ſhew the ſubmiſſion; and although the Defendant pleadeth, Nihil debet, yet if the

place

place of the ſubmiſſion be not ſhewed in the Declaration, all is naught; for although that it be but inducement, yet it is a material inducement; for if no ſubmiſſion, no award, and if no award, no Debt, and then no cauſe of Action. The Caſe of 14 E. 3. cited before, there the Accomptants by their Deed, or jointly, or ſeverally accomptable at the pleaſure of him to whom, &c. Alſo, becauſe it is ſet forth in the Declaration, that they were joint Merchants of wares, adventured into Barbary, for the ſpace of two years; the Factor in praying of allowance, ought to ſhew what wares were adventured into Barbary within the ſaid two years. Conſpiracy is a thing odious, and ought to be directly proved; and it is not reaſon, that that which he himſelf hath once allowed, he himſelf ſhall after defeat it, as here he attempts. And he relied much upon the variance between the Conſpiracy and the execution of it moved before by Coke, where by the Conſpiracy, Iſaac is made the Debtor, with his four ſons; and in the Execution, Iſaac is made the onely Debtor, and to that point, he vouched the Caſe, 3 & 4 Ph. & Ma. betwixt Brown and Nevil, That an award was to be performed, (ſcil.) an award made between Joh. Brown, for, and in the behalf of John Moore on the one part, and R. Nevil on the other part; and did not ſhew that Moore made the ſubmiſſion, and for that cauſe it was holden naught: For Moore was a principal perſon in the award, and Brown but a ſervant, &c. So in our Caſe for Iſaac. Popham, Attorney General, in an Action upon the Caſe, The Plaintiff declares, Quod cum the Defendant was indebted to the Plaintiff in 20 l. he promiſed to pay to the Plaintiff 20 l. Here it needs not, that the Plaintiff ſhew in his Declaration, the place or time in which the Defendant became his debtor, for the promiſe is the principal matter, and the other matter is but inducement: So if A. in conſideration that I at his requeſt have married his daughter, promiſed to pay to me 100 l. In an Action upon the Caſe brought by me upon this promiſe, it is not neceſſary that I ſhew the place where I married his daughter. In all perſonal things, where two are chargeable to two, the one may ſatisfie it, and one may accept of ſatisfaction, and bind his companion, and yet the one cannot have an Action without his companion, nor both onely againſt one, 18 E. 4. 3. Two joint-tenants of a Manor have one Bailiff of it, the one of them aſſigns Auditors to the Bailiff, who accompts, and is found in arrearages, the ſame is a good accompt, and it is holden there, that both, &c. may have Debt upon the arrearages of the accompt taken by the manner. And if one may aſſign Auditors, he may alſo take accompt, and diſcharge the accomptant againſt his companion. And he conceived, That this allowance of the accompt by Dawbeny, did not exclude him of his Actions, but rather gave him cauſe of Action, Nam Læſus non eſſet, niſi credidiſſet; and the Bailiff of my Husbandry, who bargains and ſells for me, if upon his accompt to me, he alledgeth and ſurmiſeth, that he hath ſold my Cattel to one who is decayed, and upon that ſurmiſe I allow his accompt; afterwards, Re comperta, I ſhall have an Action of Deceit: And in this very Caſe at the Bar, it was holden in the King's-Bench, That Dawbeny, notwithſtanding his allowance of this falſe accompt, ſhould have his Action, &c. Note that afterwards, viz. Trin. 32 Eliz. The Judgment given for Dawbeny was reverſed.

Brown and Nevil's Caſe.

*Trin.* 31 *Eliz.* In the Exchequer.

## CI. *Sir* William Waller's *Caſe.*

IN this Caſe it was moved by Winter, That if one hath Judgment in Debt, and upon that, within the year and day, ſues a Capias ad ſatisfaciendum, although that he doth not proſecute the ſame by the ſpace of

3 Len. 259. 4 Len. 44. Poſt 87.

of two or three years, yet when he pleaseth he may proceed thereupon, and he shall not be put to a Scire facias; for a Writ of Execution once sued forth, shall be a continual claim, and the party shall never be put to a Scire facias; and of such opinion was Philips.

Manwood, I grant, that if one hath sued forth a Writ of Execution, and that be continued by Vicecomes non misit breve, for two or three years, yet the Plaintiff may proceed thereupon, and shall not be put to a Scire facias: but if such Writ be sued forth, and not continued, but discontinued by a year and a day, he shall be put to a Scire facias, for it is negligence of the Plaintiff of not continuing of it, which within the year and day he might without Order of the Court, but after the year not by any Order of the Court, &c.

*Trin.* 31 *Eliz.* In the Exchequer.

## CII. Griffin's *Case.*

IT was holden in this Case, That if Lessee for years of a Messuage grants totum Messuagium suum, the Grantee hath but at Will; but if he grant all his Interest and Estate in such a Messuage, then the whole Lease passeth: and so it was said to have been lately adjudged in the Case of one Winnibank in the King's-Bench.

*Pasch.* 26 *Eliz.* In the King's-Bench.

## CIII. Seckford *and* Wolverston's *Case.*

THE Plaintiff being Bailiff of the Liberty of Esheld, in the County of Suffolk, the Sheriff of the said County directed a Warrant unto him to arrest the Defendant upon a Latitat returnable in the King's-Bench; by force of which the Defendant being arrested, became bound in the Obligation upon which the Action is brought; the Condition of which is, That if the Defendant personally appear in the King's Bench at Westminster, and there to answer, &c. It was moved, that the Obligation was void by the Statute of 23 H. 6. For the form which the said Statute prescribes for Obligations to be taken by the Sheriff, is according to these words, Appear at the day contained in the Bill, Writ or Warrant, and in such place, &c. and that all Bonds taken in other form shall be void. As to the words of surplusage [personally] the Justices were of opinion, that the Obligation was well enough, notwithstanding that because, as the Case is, the appearance of the Defendant ought to be in person upon a Latitat, for the Defendant is supposed to be in Custodia Marisc. And so it hath been adjudged in the Common-Pleas, where the appearance of the party arrested is de jure personal, &c. contrary where personal appearance is not requisite. As to the other matter [and there to answer] Wray put a difference, where the words are [there to answer] that the Bond is well enough, for it is no more in effect, but that he shall appear eo animo ut respondeat. But if the words had been [Appear and Answer] the same is a void Condition, for it may be that the Plaintiff will never declare against him: But Gawdy and Ayliff, Justices, were of a contrary opinion, and that the Bond was void by reason of the words aforesaid: but the Court would not give Judgment against the Plaintiff, but ex gratia Curiæ suffered the Plaintiff to discontinue his Action.

1 Cro. 672. 776. Owen Rep. 40.

*Pasc.*

*Paſc.* 26 *Eliz.* In the King's- Bench.

## CIV. Partridg *and* Pool's *Caſe.*

IN an Action of Treſpaſs by Partridg againſt Pool, the Plaintiff did ſuppoſe the Battery at D. in the County of Midd. The Defendant juſtified, by reaſon of an Aſſault at S. in the County of Gloceſter, abſque hoc that he beat the Plaintiff at D. in the County of Midd. upon which Traverſe the Plaintiff did demur in Law. It was argued by Popham, Attorny-General, That the Traverſe of the County is good; and he put the Caſe 21 H. 6. 8, and 9. In Treſpaſs of Battery at D. in the County of York, the Defendant doth juſtifie by an Aſſault at London, in ſuch a place in ſuch a Pariſh, and the hurt which, &c. abſque hoc, that he was guilty de aliqua tranſgreſſione in Com. Ebor. upon which iſſued a Venire facias into Yorkſhire, and as the book is, the Traverſe to the County was taken with great deliberation, &c. prout, &c. See alſo 22 E. 4. 39. And the Traverſe de jure ought to be allowed, for the Jury of Midd. are not bounden to find the Aſſault in the County of Gloceſter: See 2 Ma. Br. Jurors 50. In Actions upon tranſitory matters, although they be laid in Foreign Counties, yet the Jurors, if they will, may give their Verdict, but they are not bounden to it. 3 Len. 97. 1 Cro. 842.

Egerton, Solicitor, contrary; And he put a difference, where the juſtification is local, and where tranſitory: As in falſe Impriſonment the Defendant juſtifies, as Sheriff, the taking of the Plaintiff by virtue of a Capias directed to him at D. within the County of G. where the Plaintiff declares of an Impriſonment in another County, there the Traverſe of the County is good; for the Defendant could not take the Plaintiff by force of the ſaid Proceſs in any other County, than where he himſelf is Sheriff, and ſo the juſtification is local: 11 H. 4. 157. But in our caſe the matter of the juſtification is merely tranſitory. And at laſt, after many motions, it was adjudged, That in the principal Caſe the County was not Traverſable; and ſo Judgment was given for the Plaintiff; Gawdy, Juſtice, being of a contrary Opinion: but by Wray clearly, The Jurors are bounden, upon pain of Attaint, to take notice of ſuch a tranſitory thing done in another County: which ſee 2 Ma. Br. Attaint 134. 9 H. 6. 63.

*Paſc.* 26 *Eliz.* In the King's Bench.

## CV. Daw's *and* Mollins's *Caſe.*

IN an Attachment upon a Prohibition by Daws againſt Mollins, for that the Defendant traxit Querent. in Curiam Chriſtian. for Tithes of great Trees, ſub nomine ſylvæ ceduæ: The Defendant pleaded, that the Loppings for the Tithes of which he ſued, were the Loppings of Trees, called Aſp, Beech and Oak, de ſtipitibus prius ſuccisis creſcentes: and alſo for Hornbeams, Maples, Hazels, &c. The Plaintiff, as to the Aſp, Oak, and Beech, did demur in Law; and as to the reſidue, he pleaded, that with part he mended the Hedges, and the reſt being de minimo valore, were bound up with the boughs of the Oak, &c. into Faggots; upon which the Defendant did demur in Law. It was argued by Egerton, Solicitor, on the part of the Plaintiff; and he held, That a Wood of common Right ought not to pay Tithes, not becauſe the ſoil in which it groweth yields other Tithes of the Herbage, but becauſe non renovantur in annum; and therefore at this day no Conſultation ſhall be granted for Quarry, Stone, and Coals: But after came

came the Statute of Sarum, (vide F. N. B. 51. h.) by which it was agreed, coram Concilio Regis in Parliamento apud Sarum, Quod Conſultationes fieri debeant de ſylva cedua, eo non obſtante quod non renovantur per annum: and ſee to that purpoſe the Regiſter 49. Et ulterius, ſuper hoc facta fuit quædam Conſultatio pro Abbate de Notley de ſylva cedua: which Statute was afterwards expounded by the Statute of 45 E. 3. cap. 3. not to extend to great Wood of the growth viginti annorum, vel amplius, but onely to ſuch Wood which is called Sylva Cedua. And at laſt, after many motions, it was ruled, That becauſe the Defendant had not ſhewed, that the Trees, (ſcil.) Oak, Aſh, and Beech, were not before cut within twenty years before the laſt ſuccision, of which the Tithes are now demanded, Tithes ſhall not thereof now be paid. And as to the other point, That the Hornbeams, Sallows, &c. did grow ſparſim amongſt the Oaks, and the Owner felled the whole Wood, and cauſed them to be promiſcuouſly cut into Faggots, and bound up in Faggots together, and the moſt part of every Faggot was Oak, and the reſidue was of little value, ſo as the ſeverance of the Sallows, &c. from the Oak, &c. would not quit the charge; in ſuch caſe Tithe ſhall not be paid: but of the other part, If the moſt part of the Wood be Sallows, &c. and here and there ſparſim groweth an Oak, &c. and the Owner cuts down all the Wood, and makes Faggots as before, Tithes in ſuch caſe ſhall be paid of them.

*Trin.* 26 *Eliz.* In the Exchequer.

## CVI. *The* Queen *and Lord* Lumley's *Caſe.*

Hob. 304. 3 Len. 101.

BEtwixt the Queen and the Lord Lumley, it was moved in the Exchequer; Queen Mary ſeiſed of the Rectory of D. granted advocationem Eccleſiæ de D. If now by this Grant the Advowſon paſſeth as now diſappendant, or the Rectory it ſelf paſſeth as appropriate? or nothing at all paſſeth? was the Queſtion. And by Manwood, chief Baron, the Advowſon doth not paſs, but doth remain appropriate; as it was before; for the Church, as it was appropriate by a judicial act, ſo without ſuch an act it cannot be diſappropriate: And he ſaid, That by the Grant of the Advowſon, the Rectory did not paſs; for by the Appropriation the Advowſon is gone, and is not in eſſe, and ſo by conſequence cannot be granted: And it is not within the Statute of 4 and 5 Ph. and Ma. of Confirmation of Grants of the King; for the ſaid Statute doth onely help miſrecital, miſnaming, miſtaking, &c. but here there is no ſuch thing in rerum natura, as the Patentee pretendeth to be paſſed by the Patent: and if it were in the caſe of a Subject, nothing would paſs; as it was adjudged in one Sand's Caſe, 11 Eliz. And he ſaid, that at this day a Parſonage may be diſappropriated, but that ought to be by a judicial act, as by Preſentment, and not by any other private act of the Proprietor: And ſo he ſaid, a Church was diſappropriated by the Lord Dyer, by Preſentment, which of late he made unto it.

Sand's *Caſe.*

Roll. 240. Tit. Appropriat.

*Trin.* 26 *Eliz.* In the King's Bench.

## CVII. Herring *and* Badlock's *Caſe.*

3 Len. 94.

A Replevin was brought by Herring againſt Badlock, who avowed for damage-feaſant, and ſhewed, That the Lady Jerningham was ſeiſed of ſuch a Manor, whereof the place where, &c. and Leaſed the ſame to the Defendant for years, &c. The Plaintiff ſaid, That long time

time before King Henry the eighth was ſeiſed of the ſaid Manor, and that the place where, &c. is parcel of the ſaid Manor demiſed and demiſeable by Copy, &c. And that the ſaid King, by ſuch a one his Steward, demiſed and granted the ſaid parcel unto the Anceſtor of the Plaintiff, whoſe heir he is, by Copy in Fee, &c. and upon that there was a Demurrer, becauſe that by that bar to the Avowry the Leaſe ſet forth in the Avowry is not anſwered, for the Plaintiff in the bar unto the Avowry ought to have concluded; And ſo was he ſeiſed by the Cuſtome, until the Avowant prætextu of the ſaid term for years entred: And ſo it was adjudged.

*Trin.* 28 *Eliz.* In the King's Bench.

## CVIII. Moor *and Sir* John Savage's *Caſe*.

IN an Action upon the Caſe by Moor againſt Sir John Savage and his Wife, for that the ſaid Lady had reported, That Moor was a lying Knave, and a perjured Knave; The Defendant juſtified, That where an Eſtate for life abſolute was deviſed to the ſaid Lady by her former Husband, the Plaintiff had depoſed, that the ſaid Land was deviſed to the ſaid Lady, if ſhe kept her ſelf ſole: To which the Plaintiff replicando ſaid, Of his own wrong without ſuch cauſe: Egerton, Solicitor, did demur upon it; for he ſaid, The Plea goeth to all the juſtification before; for where part of a Plea, (ſcil.) the juſtification is matter of fact, and part is matter of Record, there, Of his own wrong, &c. is no good Plea, but there ought to be a ſpecial Traverſe, abſque hoc, that he ſo depoſed, or abſque hoc, that the Deviſe was abſolute: And this Plea here, Of his own wrong, &c. goes to matters in fact onely, and ſuch which lie in the notice of the Jury: See 5 H. 7. 6. Although that divers matters are alledged in the bar, yet this Plea, Of his own wrong without ſuch cauſe, &c. extends to all, where no matter of Record is alledged in the Plea: As in falſe Impriſonment, a Capias is directed to the Sheriff, being Defendant, to arreſt the Plaintiff, in ſuch caſe ſuch general Plea is not good; but there he may plead Nul tiel Record: See alſo 13 H. 7. 3. 21 H. 6. 5. And here a principal matter in the juſtification is matter of Record, and therefore ſuch a Plea here is not good. Altham contrary, If the principal matter in ſuch juſtification be matter of Record, then ſuch a Plea is not ſufficient; but if the matter of Record be but inducement, then the Plea is good enough: And he vouched 45 E. 3. 7. In Treſpaſs the Defendant ſaith, That he is Forreſter of the ſaid Forreſt of B. and at a Swanmoot it was preſented by the Forreſters, Verderors, Regardors, and Agiſtors, That the Plaintiff had taken Deer in the ſaid Forreſt, upon which the Defendant came to the Plaintiff, and prayed him to find Pledges to anſwer before Juſtices in Eyre, &c. and he refuſed ſo to do, for which cauſe he kept the Plaintiff until he made agreement, and demanded Judgment, if any wrong, &c. and the Plaintiff replicando ſaid, Of his own wrong, &c. and the iſſue was accepted of by the Court; yet he ſaid the Preſentment in the Swanmoot was not matter of Record, but onely inducement, and the Requeſt to find Sureties, which he would not, for which cauſe he took and impriſoned him, the ſame was the principal matter, and but matter in fact; and therefore he ſaid, that the Plea was good; and he ſaid, that in this caſe the Oath is not on Record. And Coke ſaid, That in the Caſes put by Altham, Of his own wrong without ſuch cauſe, is a good Plea, with an abſque hoc unto the matter of Record: See the Book of Entries 520. ſee 36 H. 8. Action upon the Caſe 104. without that, that he ſwore modo & forma: It was adjourned.

Poſtea 102, 103.

*Trin.* 28 *Eliz.* In the Common Pleas.

## CIX. Firrell *and the hundred of* B's *Case.*

IN an Action upon the Statute of Hue and Cry by Firrell against the Hundred of B. The Defendants pleaded, Not guilty, and in Evidence, the Plaintiff, to prove that he was robbed, as he had declared, offered to the Jury his oath, in making good his Declaration, which Anderson and Periam Justices, utterly refused. But Windham affirmed, That such an oath had been accepted in the Case of one Harrinton, where the Plaintiff could not have other Evidence to prove his Cause, in respect of secrecy; For those who have occasion to travel about their business, will not acquaint others what money, or other things they have with them in their journies: And we see, that in some causes, the Law doth admit the oath of the party in his own cause; as in Debt, the Defendant shall wage his Law: Periam, That's an ancient Law, but we will not make new Presidents, for if such oath be accepted in this Case, by the same reason in all cases where is secrecy, and no external proof, upon which would follow great inconveniencies: and although such an Oath hath been before accepted of, and allowed here, yet the same doth not move us; and we see no reason to multiply such Presidents. The Declaration is, that the Plaintiff was robbed of 10l. de denariis ipsius querentis; and upon the Evidence it appeareth, That the Plaintiff was the Receiver of the Lady Rich, and had received the said money for the use of the said Lady, and exception was taken to it by Shuttleworth, but it was not allowed; for the Plaintiff is accomptable to the Lady Rich the said money. And it was agreed, that if he who was robbed, after he hath made Hue and Cry, doth not further follow the thieves, yet his Action doth remain.

*Mich.* 29 *Eliz.* In the King's-Bench.

## CX. Large's *Case.*

3 Len. 182. THE Case was, A. seised of Lands in Fee, devised the Lands to his wife, until William his son should come to the age of 22 years, and then the Remainder of part of the Lands, to his two sons, A. and John. The Remainder of other part of his Lands, to two others of his said sons, upon condition, That if any of his said sons before William should come to the age of 22 years, shall go about to make any sale of any part, &c. he shall for ever lose the Lands, and the same shall remain over, &c. And before his said son William came to the age of 22 years, one of the other sons Leased that which to him belonged, for 60 years, and so from 60 years to 60 years, until 240 years ended, &c. Bois, A. and J. are joynt-tenants of the Remainder, and he said, That the opinion of Audley, Lord Chancellor of England, is not Law, (scil.) where a man deviseth Lands to two, and to their heirs, they are not joynt-tenants, as to the survivor, but if one of them dieth, the survivor shall not have the whole, but the heir of his that dieth shall have the moyety: See 30 H. 8. Br. Devise 29. And he said, That this Lease, although it be for so many years, is not a sale intended within the Clause, and so is not a Joynture. 46 E. 3. One was bounden, that he should not alien certain Lands, and the Obligor did thereof enfeoff his son and heir apparent, the same was held, to be no alienation within the Condition of the Obligation: Of the other side it was argued, The remainder doth not

not veſt preſently; for it is incertain, if it ſhall veſt at all; for if William dieth before he cometh to the age of 22 years, it was conceived by him, that the Remainder ſhall never veſt, for the words of the Will are, Then the Lands ſhall remain, &c. 34 E. 3. Formedon 36. Land is deviſed to A. for life, and if he be diſturbed by the heir of the Deviſor, that then the Land ſhall remain to D. Here D. hath not any remainder, before that A. be diſturbed. It was farther argued, that here is a good Condition, and that the Deviſee is not utterly reſtrained from ſale, but onely untill a certain time, (ſcil.) to the age of William of 22 years. And it was ſaid, that this Leaſe is a Covenous Leaſe, being made for 240 years, without any Rent reſerved: As ſuch a Leaſe made for 100 years, or 200 years, is Mortmain, as well as if it had been an expreſs Feoffment, or Alienation. But it was ſaid by ſome, that here is not any ſale at all, nor any leaſe; for the Leſſor himſelf hath not any thing in the Land demiſed: As if a man diſſeiſeth a Feme ſole, and leaſeth the Lands, and afterwards marrieth the diſſeiſee, he ſhall avoid his own Leaſe, 5 E. 3. One was bound that he ſhould not alien ſuch a Manor, the Obligor alieneth one Acre, parcell of it, the Obligation is forfeit, See 29 H. 8. Br. Mortgage 39. A. leaſeth to a religious houſe for 100 years, and ſo from 100 years to 100 years, untill 800 years be encurred, the ſame is Mortmain, Vide Stat. 7 E. 1. Colore termini emere, vel vendere. And in the principal Caſe, if the Deviſee had entred into a Statute to the value of the Land leaſed, by the intent of the Will, the ſame had been a ſale; and ſuch was the opinion of the whole Court: and by the Court, the word in perpetuum, ſhall not be referred to the words precedent, but unto the words following; (ſcil.) in perpetuum perdat the Lands. And if a cuſtome be in the caſe that the Infant of the age of 15 years may ſell his Lands; if he make a Leaſe, the ſame is not warranted by the cuſtome: And afterwards it was adjudged by the whole Court, that the Leaſe made as before, was a ſale within the intent of the Will of the Deviſor.

Antea 36,37.

*Hill.* 29 *Eliz.* In the King's-Bench.

## CXI. Brooke's *Caſe.*

APpeal of Burglary was brought againſt Brooke, who was found guilty; and before Judgment given, the Plaintiff died, And now Egerton moved that Judgment ſhould be given for the Queen upon that verdict, or at leaſt that the Declaration in the Appeal ſhould be in lieu of an Indictment, and that the Appealee be thereupon arraigned and put to anſwer the ſame. For if the Appellant had been Nonſuit, or releaſed, the Defendant ſhould be arraigned at the ſuit of the Queen. Coke, God hath now by the death of the party, delivered the Defendant: and it is not like, where the Plaintiff releaſeth, for there it is the default of the Act of the party, but here it is the Act of God; and he held it for a rule, That where auterfoits acquit is a good Plea, there alſo auterfoits convict ſhall be a good Plea: And it was holden in Sir Tho. Holcroft's Caſe, That where the party is convicted at the ſuit of the Queen, there the Appeal doth not afterwards lie. Wray, If the Appellant dieth before Verdict, the Defendant ſhall be arraigned at the ſuit of the King; But if his life hath been once in jeopardy by Verdict, he conceived, that it ſhall not again be drawn into danger; and ſome were of opinion that the Defendant ſhould be arraigned at the ſuit of the Queen upon the whole Record, and plead auterfoits acquit, and that they ſaid was the ſureſt way.

Sir Thomas Holcroft's Caſe.

29 *Eliz.* In the Exchequer.

## CXII. Ognel *and* Paſton's *Caſe.*

1 Cro. 64. CLement Paſton was Defendant in an Action of Debt brought againſt him by George Ognel, upon an Eſcape; and the Caſe was this: Francis Woodhouſe was bound in a Recognizance to the ſaid Ognel; Whereupon Ognel ſued forth a Scire facias, and upon two Nihils returned, had Judgment, and upon that a Levari facias, and then a Capias ad ſatisfaciendum, upon which Paſton the Defendant, a Sheriff of Norfolk, to whom the Capias was directed, took the party, and afterwards ſuffered him to eſcape. The Defendant pleaded, That before the ſaid Capias, the ſaid Francis Woodhouſe was committed to him, and in his ward continued for Felony; and after the Capias, was endicted thereof, and arraigned, and found guilty, after which he eſcaped: And all this was found by ſpecial verdict: Firſt it was argued, if upon a Recognizance acknowledged in the Chancery an Action lieth; and it was ſaid by Bois, That it doth not lie in the mouth of the Sheriff to ſay, that this Capias doth not lie in the Caſe: As if a Juſtice of Peace maketh a Warrant to a Conſtable, which Warrant is not good in Law, yet the Conſtable is not to examine that, or to diſpute the validity of it, 5 H. 7. And a Capias hath lain in ſuch caſe, and ſo it hath been the courſe for the ſpace of 200 years: and he ſaid, That although Francis Woodhouſe was convict of Felony, yet the ſame is not any diſcharge of the execution, as 35 H. 6. 8. although the husband be attainted of Felony, yet he is not ſo dead in Law, but if the King pardon him afterwards, he ſhall be reſtored, and his wife ſhall have Dower; and if he be killed, his wife ſhall have an Appeal: 12 H. 4. My Villain is attainted, the ſame is no diſcharge of his villainage as to me; But if the King pardon him after, he ſhall be my Villain, 6 E. 4. 4. One is in Execution pro fine Regis, and afterwards is outlawed for Felony, and hath his Charter of pardon for the Felony yet he remains in Execution for the intereſt of the party, for there the Execution is not extinct, but onely ſuſpended. Godfrey contrary, Capias doth not lie upon a Recognizance; but if Debt be brought upon a Recognizance, and the Plaintiff recovereth, then a Capias lieth; which ſee 14 Eliz. Dyer 306. Puttenham's Caſe. 2 H. 4. 6. In Dower the Demandant recovereth her Dower, and damages, and prayeth a Capias ad ſatisfaciendum for the damages, but ſhe could not have it; for no Capias lieth upon the original; and to the ſame purpoſe, ſee 8 R. 2. Fitz. Execution, 164. 15 H. 7. 15. Capias pro fine lieth for the King, where no Capias lieth in the Original; but no Capias ad ſatisfaciendum for the party; no Capias in Debt before the Statute of 25 E. 3. and ſee the Stat. of Weſt. 2. cap. 18. cum debitum fuerit recognit. ſi in electione ſequent. execut. habere per Fiere facias, or Elegit, therefore no other manner of Execution; for the Statute hath provided ut ſupra. And he ſaid, That debt doth not lie upon a Statute Merchant, or Staple: See 15 H. 7. 16. Another reaſon why a Capias doth not lie in ſuch caſe, is upon the words of the Recognizance, Et niſi fecerit, tunc concedit, quod ſumma prædict. levetur de bonis & catallis, terris & tenementis; Ergo, not of the body. And when Woodhouſe was convict of Felony, the Queen had an intereſt in his body, and upon the pardon, the Execution which was ſuſpended during the conviction, is now revelved: And he confeſſed the caſe of Villainage, that during the attainder, the Lord cannot meddle with the Villain in the preſence of the King, See 27 Aſſ. 49. and ſee 2 H. 4. 65. A. was condemned to B. in certain damages upon an Action of Treſpaſs brought by B. againſt A. and A. was committed to Newgate, in Execution upon a Capias ad ſatisfaciend. and afterwards was arraigned of Felony, and thereof attainted,

and

and committed to the Ordinary, as Clark, Attaint. And the Juſtices commanded the Ordinary, That after that the priſoner had made his purgation, that he ſhould not let him go at large, but ſhould conduct him to the priſon of Newgate again: And there is a Quære made by the Reporter, If after purgation the Ordinary might ſuffer him to eſcape; and if he at whoſe ſuit he was condemned in Treſpaſs ſhall have debt againſt the Ordinary for ſuch eſcape. At another day the matter was argued by Poke for the Plaintiff, at the Common Law, No Land was ſubject to Execution, i. no Lands of the Debtor himſelf; but yet the Lands of the Debtor being deſcended to his heir, ſhould be chargeable to the Obligee of the Debtor, in which he and his heirs were bound, and that ſeemed to be very ſtrange; and he conceived, That in that point, cuſtome and uſage had encroached upon the Common Law: The Statute of Weſt. 2. c. 13. gave Elegit of the moyety of the Lands; but yet there was no Capias in Debt before, 25 E. 3. cap. 17. before which Statute, it was a general Rule, That no Capias lay at the Common Law, but where the King was to have a Fine, See 35 H. 6. 6. At the Common Law Capias did not lie but where the Action is vi & armis, or that the King is to have a Fine; For there was Outlawry at the Common Law in ſuch caſe. It will be objected, That the Statute of 25 E. 3. which gave Capias in Debt, doth not extend to a Scire facias upon Recovery; That ſuch Proceſs ſhall be made in a Writ of Debt, as is uſed in a Writ of Accompt; and here is no Writ of Debt, but a Scire facias onely: If my Debtor upon an Obligation cometh without a Writ, and confeſſeth the Debt, I ſhall have a Capias againſt him, and yet the ſame is not in a Writ of Debt: Ergo, ſo in caſe of Recognizance. Where a Statute ſpeaks preciſely of a Writ Original; yet oftentimes by Equity it ſhall extend to a Scire facias, and other judicial Proceſs: As upon the Statute of 25 E. 3. cap. 7. which enables the Incumbent to plead in a Quare Impedit. It ſhall extend to a Scire facias upon a Recovery in a Quare Impedit, 46 E. 3. 13. And in our caſe a Capias doth not lie by the Letter, yet it lieth by Equity. And he ſaid, That Statute which helps the Subjects to get their debts and rights, are to be, and have been taken beneficially and liberally expounded, in advantage of the Creditors. And ſee 48 E. 3. 14. Where a Scire facias is ſued upon a Recognizance, a Capias doth not lie, but there it is holden, that in a Scire facias, upon a Recovery in debt, a Capias lieth. And as to this Capias, the Sheriff is but the miniſter to the Court, and he is not to controll the Court, but to accept of the ſame, as the ſame is directed to him. It is a common learning in our Law, That although the Court doth proceed inverſo ordine, yet it ſhall not be utterly void, 36 H. 6. 34. Judgment given at the Common Law of Lands within the five Ports, for the five Ports in times paſt, were parcel of the Crown: But of Lands in Wales it was otherwiſe before the Statute of 27 H. 8. by which Wales is united to the Crown. And although that the Capias erronice Emanavit, the ſame is but erroneous, and ſo voidable, and not void, for Error may be aſſigned in the Executione judicii, as in redditione judicii, 16 H. 7. 6. Outlawry without an Original Writ, is not void, but voidable, 2 R. 2. and the reaſon thereof is given, 11 H. 7. in Collins's Caſe, but they are Judges of the cauſe, although that their proceedings be not according to Law. But the Sheriff, or any other ſtranger, ſhall not take advantage thereof, See 8 E. 4. 21 E. 4. and he cited to this purpoſe, 13 E. 3. Barre 253. The Jailor ſhall not take advantage of undue proceedings of the Auditors againſt an Accomptant; and he inſiſted much upon the Uſage and Precedents, and cuſtoms of Courts which are Laws in ſuch caſes. And although that by ſtrict and preciſe rule of Law, a Capias doth not lie naturally nor properly upon a Recognizance, where the ſuit begins by Scire facias, yet becauſe the uſual practice, and common experience hath allowed of it, and admitted

mitted thereof from time to time: It is ſafer to ſuffer a miſchief to one, than an inconvenience to many. And although the Proverb, Exempla illuſtrant, non docent aut probant, may hold place in ſome arts and Sciences, yet in our Law, Examples are good arguments, 11 E. 4. 3. In the King's Bench, a man in cuſtodia Mariſchalli, ſhall be put to anſwer a Bill, but in the Common-Bench, a man who is in the cuſtody of the Guardian of the Fleet, ſhall not be put to anſwer to a Bill, and that is by reaſon of the ſeveral uſages and cuſtoms in the ſaid ſeveral Courts; ſo as cuſtome and uſage makes a Law in ſuch caſe. 39 H. 6. 30. in a Writ of Meſne, The Judges were clear of opinion, That the Plaintiff ought not onely to ſhew the Tenure betwixt him and the Tenant Peravail, but alſo betwixt the Meſne and the Lord Paramount; yet when they had conferred with the Prothonotaries, and ſaw the Precedents of former times in ſuch caſes, They would not change the former courſes, notwithſtanding that their opinions were to the contrary: So 2 H. 7. 8. The Venire facias is, 12 liberos & legales homines, and the Sheriff returned 24, and holden good, by reaſon of the uſual courſe of the Court in ſuch caſes; and yet in our Law, the number of perſons is not material, which ſee in the Earl of Leiceſter's Caſe, 15 H. 8. but cuſtome diſpenſeth with the ſame.

Atkinſon argued the contrary; At the Common Law for Execution in Debt within the year, a Levari facias, and a Fieri facias lay; after the year the party was put to a new Original; and there was no Capias at the Common Law, but in caſes of contempt, force, or other notable miſdemeanour, untill the Statute of 25 E. 3. cap. 17. which gave it in Debt, Detinue, &c. And the Statute of Weſt. 2. cap. 18. gave Fieri Facias and Elegit, but no Capias was given upon a Recognizance by any Statute, and he relied much upon the Book of 48 E. 3. before cited, the rule of which Book is, That in a Scire facias upon an Original in which a Capias lieth, the Scire facias ſhall follow the nature of the Original upon which it is founded: but where a Capias ad reſpondendum doth not lie, there not a Capias ad ſatisfaciendum, 34 H. 6. 451. In Debt againſt Executors, they appear and plead fully adminiſtred, and it is found againſt them, and Judgment is given for the Plaintiff, who after the year ſueth a Scire facias againſt the Executors, and Execution awarded by default, and thereupon a Capias and Exigent: And that matter being ſhewed to the Court, a Superſedeas was granted, becauſe the Capias improvide & erronice emanavit: for no Capias lieth againſt Executors where they plead, &c. although it be found againſt them, Ergo, neither a Scire facias grounded thereupon. And although the Stat. of 25 E. 3. gives a Capias in Debt, yet if Debt be recovered in a Juſticies, a Capias doth not lie by the Equity of the ſaid Statute: and he relied very ſtrongly upon Puttenham's Caſe, 13 Eliz. cited before. And as to that which hath been ſaid, That notwithſtanding, that the Capias was againſt the Law, and ſo his impriſonment by colour thereof wrongfully, yet, de facto, he was in Priſon, and the Sheriff hath taken him, and he ſhall excuſe himſelf in a falſe impriſonment brought; yet I ſay, That this erroneous Proceſs appearing to you, you will not again err, by allowing theſe erroneous proceedings, but rather reform them: For the Sheriff himſelf, who is a ſtranger to the Record, cannot have Error to reverſe theſe proceedings, and ſo without remedy, unleſs the Court doth relieve him therein. And he ſaid farther, That this Capias, Poſito quod legitime emanavit, cannot faſten or work upon Francis Woodhouſe, being impriſoned, and convict of Felony; for being impriſoned, and reſtrained of his liberty, how can he (his reſtraint continuing) be de novo reſtrained before that he be enlarged and reſtored to his liberty? Nam omnis privatio præſupponit habitum; and Ergo, impriſonment, liberty precedent. And ſo he concluded, That Francis Woodhouſe, Neque de facto, nor de jure, was in priſon;

priſon: and that no Capias lieth in the Caſe, eſpecially after the year, as here it was, and the party being condict and in priſon, cannot be taken, &c. Manwood, If within the year a Levari facias, or a Fieri facias be ſued forth and be retorned, not ſerved, or that Vicecomes non miſit Breve, and ſo the year paſſeth in the default of the Sheriff, yet the Plaintiff ſhall not be put to a Scire facias. At another day it was argued by Tanfield for the Defendant, That upon this Scire facias no Capias lieth, and then no lawfull Execution, and then no eſcape. Where there is no Capias in the Original, there is no Capias in the Execution, but here in our Caſe, there is not any Original, becauſe it is a Scire facias upon a Recovery, Ergo, no Capias can be where there is not any Original. As to that which hath been ſaid, That the ancient Preſidents and courſe in Cancel. is againſt us; be it ſo; yet the courſe in the King's Bench and Common Pleas is with us, That a Capias doth not lie in ſuch caſe of Scire facias. And the Chancery as to the Common Law ought not to vary from theſe Courts, for one and the ſame Common Law ought to be in all the ſaid Courts, of things of the Common Law, and the Preſidents allebged of the other ſide are ſilent, and ſleeping proceedings and preſidents, Slips of Clarks, which were never drawn into queſtion; the ancienteſt of which was hatcht but in the later part of the Reign of King H. 8. And if the Common Law doth not warrant ſuch Executions, Truly the preſidents cannot make ſuch impriſonments lawfull without Act of Parliament. It hath been ſaid, that Executions ought to be favoured, that is true, but alſo Liberty, to which the Law hath ſpecial reſpect: See the Statute of Magna Charta, Nullus liber homo capiatur, vel impriſonetur, niſi per legale judicium parium ſuorum, vel per legem terræ; and this is not Lex terræ, but uſage onely: and Malus uſus eſt abolendus, 26 Eliz. Error was brought upon a Judgment given in Curia de Woodſtock, which is a Court of Record, and Error aſſigned, for that they had awarded Execution ſecundum conſuetudinem Villæ, againſt one who had bailed the Defendant without a Scire facias firſt ſued forth againſt him, i. the bailee, and it was adjudged Error, and the cuſtome could not maintain it, for the Bailee might have a releaſe or other matter of diſcharge to plead: And he cited the Caſe of 13 and 14 Eliz. Dyer 306. That upon a Scire facias out of a Recognizance in Chancery, Judgment was given for the Plaintiff, and the Warden of the Fleet was commanded to detain the Conuſor in his cuſtody, in Execution for the Plaintiff, and afterwards the Conuſor eſcaped, the Plaintiff not ſatisfied, And it was holden no eſcape, for his body was not liable, in caſe of a Recognizance, to the Execution: and ſee alſo the book of Entries, 500 there is a Rule put, If the Recognizee will have execution within the year, he may have a Fieri facias, or Elegit, but not a Capias ad ſatisfaciendum. And he conceived, that this Proceſs is not onely erroneous, but alſo utterly void: As a Capias in a Formedon, contrary where in Debt a Capias is awarded after the year where it ought to be Scire facias, the ſame is but erroneous; for ſuch Proceſs lieth upon ſuch Judgment, if he had not ſurceaſed his time. Another matter he moved, becauſe this iſſue is not well tried, for it was tried by Niſi prius out of the Exchequer, and the Statute of Weſt. 2. cap. 30. Mar. 14 E. 3. cap. 1. do not give Niſi prius in Cauſes out of the Exchequer but onely out of both Benches; but Cauſes out of the Exchequer are tried by Commiſſion; and here their Commiſſion was inſufficient; for it was directed, Chr. Wray and Williel. Periam, without ſaying, Et eorum alterî; ſo as it was joynt, and not ſeveral, and Wray at the time of the trial, was as the Parliament at London, and ſo the cauſe was tried before Periam onely, and therefore coram non Judice. At another day, The Caſe was argued by the Barons of the Exchequer. And Clark Baron, conceived that the Plaintiff ought to retover, and he ſaid, That upon the eſcape, the Common Law gave an Action upon the Caſe againſt the Sheriff; and the reaſon why the

antea 77.

Sheriff

Sheriff ſhall be charged, is, that one cannot be in Execution but once; and then if the Sheriff ſhould not be charged, the party Plaintiff ſhould by negligence of the Sheriff loſe his Suit, and alſo his Debt: And admit that a Capias doth not lie in the Caſe, yet the Execution by force thereof is not void, but voidable onely; and Error may be aſſigned as well in the Execution, as in the Judgment; which ſee 17 Aſſ. 24. where the Recognizor in a Statute Merchant aliened the Land, and afterwards the Conuſee ſued forth Execution, ſo as the Land was extended, ſuppoſing the payment, i. Solvend. 14 E. 3. whereas in truth it was 16 E. 3. and the Feoffee brought a Writ of Error thereupon, and it was allowed; but the Sheriff ſhall not take advantage of the ſame: And truly the common courſe is, That a Capias lieth upon a Recognizance: and 7 H. 4. 101. upon a Recognizance acknowledged for the Peace, a Capias lieth for the King: and a Recognizance is but an Obligation of Record; and wherefore ſhould not a Capias lie thereupon, as well as upon an Action brought upon an Obligation? The Statute of Weſt. 2. cap. 45. Si recens ſit Cognitio ſtatim habeat Querens Breve de Executione illius Recognitionis: and the Statute doth not ſpeak in certain what manner of Writ, or what manner of Execution, therefore we ought to reſort to the Common Law for it, as that is a Capias. Gent, Baron argued and agreed in every point with Baron Clark.

Manwood, chief Baron, argued, That the Plaintiff ſhould recover; and he put the Caſe of Recognizance: The Plaintiff ſueth two Scire facias's, upon which two Nichel's are returned; and afterwards a Levari facias, and upon that alſo Nihil is returned, and then iſſueth a Capias ad ſatisfaciendum for to take the ſaid Francis Woodhouſe, who then was in Priſon for Felony, upon which Capias the Sheriff did arreſt him, and he being afterwards convicted of Felony, eſcaped; upon this matter Debt is brought againſt the Sheriff. A Recognizance taken in the Chancery is a thing upon Record in a Court of Record, an Obligation of Record, and a Debt upon Record. It hath been objected, where no Capias lieth in the Proceſs upon the Original, there no Capias lieth upon the Execution: but it is good to examine the Reaſon thereof; for Lex plus laudatur quando ratione probatur: The Capias upon a Recognizance is not by 25 E. 3. but by the common Law: for here is a Debt upon Record, wherefore ſhall not this body be ſubject to it, as well as in the caſe of a Debt upon a bare Obligation? I do admit the Rule, That where there is no Capias ad reſpondendum, there is no Capias ad ſatisfaciendum, but that ought to be intended in caſes where there is an Original, and Meſn Proceſs before Judgment; but here is no Original, nor Meſn Proceſs before Judgment, ergo, our Caſe is not within the ſame Rule: But I will put a good Rule; It is Debt upon Record, ergo a Capias lieth: In the King's Bench, If the Defendant comes in by Latitat, if the cauſe whereof the Action is brought be of importance, he is to put in ſpecial Bail; and thoſe who bail him ſhall be bounden in a Recognizance, &c. The Defendant is condemned in the Action: Now if the Defendant cannot be found, ſo as Execution may be ſued forth againſt him, then a Scire facias ſhall iſſue forth againſt the Sureties which bailed him, and upon that a Capias, and that is very frequent there in uſe: So alſo is the courſe of the Court of Common Pleas; ergo it ſhall be ſo in the Chancery in caſe of a Recognizance. If one be taken in Execution upon a Statute Staple, and ſueth an Audita Querela upon a Releaſe, or other matter, and be bound with Sureties in the double value, &c. to the King, and to the party: If he be condemned in the Audita Querela, &c. and cannot be found, a Scire facias ſhall iſſue forth againſt the Sureties, and thereupon a Capias. And this queſtion, If the Capias in this caſe lieth, or not? is to be decided either by Audita Querela in the Chancery, or by Error in the King's Bench: for the ſaid Courts have authority to affirm the proceedings,

or

or to diſaffirm them. And here the Queſtion was, If Woodhouſe were impriſoned or no? and not, if the Capias erronice emanavit or not? And he took a difference where Proceſs is awarded out of a Court which hath not authority of the Principal cauſe; there it is coram non judice, and the Proceſs is void; and if the Sheriff taketh the party by force of ſuch Proceſs, it is meerly void, and he a Treſpaſſor; but contrary if the Court hath authority of the principal cauſe, there if the Proceſs be miſconceived, it is onely erroneous. An unskilfull man in Chancery 10 Co. 76. makes an Appeal of Murther, retornable in the Common Pleas; and there an unskilfull Clark makes a Capias upon it, the ſame is coram non judice, and not all together void: But if in a Writ of Entry, in the nature of an Aſſiſe, the Demandant hath Judgment to recover Debt and Damages, and thereupon iſſueth a Capias, the ſame is not void, for it is but a miſawarding of the Proceſs, & provide emanavit. If out of the Common Pleas immediately a Writ iſſueth to the Sheriff of Cheſter, which is a County Palatine, where the King's Writ doth not run, the ſame is void, and falſe impriſonment lieth upon ſuch a taking. A Formedon brought in the King's Bench, and upon that a Capias, is void, & coram non judice; and the Sheriff is bound to take notice of the Law in ſuch caſes, that thoſe of the King's Bench have not authority to hold plea in real Actions. As to that, That Woodhouſe was convict of Felony, the ſame ſhall not avoid the Execution; but I grant, that the King ſhall be ſatisfied before the ſubject, &c. And he relied much upon the ſaid Caſe cited before, 13 E. 3. Bar. 253. as to the matter of the Capias: 19 H. 9. In Eſcape the Defendant pleaded a Releaſe of him who recovered to the Priſoner being in Execution, and it was holden no Plea. And in the principal Caſe Judgment was given for the Plaintiff.

*Mich.* 29 *Eliz.* In the Exchequer.

## CXIII. Bridget Clark's *Caſe*. Antea 30, 31.

THE Caſe was, Clark was indebted to Archdel by Obligation, and afterwards delivered to Andrews certain Hogſheads of Wine to ſatisfie the ſaid Archdel the ſaid Debt: and afterwards the Obligation of Clark is aſſigned to the Queen for the Debt of Archdel: And if the property of the ſaid Hogſheads of Wine were altered by the delivery of them to Andrews before the Aſſignment? was the Queſtion. Egerton, Solicitor, The property is not altered, for the Bailor might have an Action of Account againſt Andrews before that he hath delivered the ſame over according to the Bailment; but if he hath delivered them over, the ſame is a good bar in an Account: But if one be accountable to me upon a Bailment, and afterwards I do require him to deliver the Goods over to A. the ſame is not in bar of Account, but is good in diſcharge of account before Auditors; for the ſame is matter after the Bailment, not upon the Bailment. If Goods be bailed to bail over upon a conſideration precedent of his part to whom they ought to be bailed, the Bailor cannot countermand it; otherwiſe it is, where it is voluntary and without conſideration; but where it is in conſideration of a Debt not countermandable, contrary, if it be to ſatisfie the Debt of another. Manwood, Where the Debtor of the King is inſufficient there a Debt due to him ought not to be aſſigned to the King, but onely where the Debt of the King is doubtfull, and that was the antient courſe; but now at this day multi videntur & habentur divites, qui tamen non ſunt; and therefore omnis Ratio tentanda eſt, for the Recovery of the King's Debts. But as to the Caſe before us; The Wife is Executrix to her Husband, who was indebted to Archdel, and ſhe delivers the Goods to Andrews to ſatisfie Archdel, and all that is before the Aſſignment: And I am of Opinion, That the property of the ſaid

Goods is altered; for, as the case is, Andrews was Surety for Clark, and hath a Counter-Bond of Clark to save him harmless: If I borrow 100l. and deliver unto the Lender Plate for the security of it, the property general of it is in me, yet the Bailee hath a special interest in it, until he be paid. If Goods be delivered to A. to pay unto B. A. may sell them. An Executor hath Goods of the Testators, and he with his own Monies payeth the Debts of the Testator, he shall retain the Goods, and the property is altered. And here in our case, Andrews may by virtue of this Bailment sell the Goods, and with the Monies arising thereof pay the said Archdel. And afterwards Judgment was given accordingly, that the property of the Goods by the delivery over by Andrews was altered.

*Mich.* 29 *Eliz.* In the Exchequer.

## CXIV. Foskew's *Case*.

FRancis Foskew, seised of the Manor of Foskew in his Demesn as of fee in consideration of a Marriage to be had with Francis his Son with M. Daughter of Sir Edw. Huddleston, 9 Feb. 25. Feb. covenanted to levy a Fine of the Manor aforesaid; and that the said Fine should be to the use of himself and his Wife for their lives, and after their deaths to the use of the said Francis their Son, and M. and the heirs of their bodies begotten, with remainders over: The Fine was levied accordingly: afterwards, 19 Octob. 27 Eliz. Francis the Father acknowledged a Recognizance to the Queen, and died, his Wife died; and now this Manor is extended for the Debt to the Queen by force of the Statute of 33 H. 8. And now Coke came into Court, and prayed that the said Manor might be discharged of the Debt to the Queen, because it is not chargeable by the said Statute; the words of which Statute are, All Manors, Lands, Tenements, &c. which hereafter shall descend, remain, or revert in Fee-simple, tail general or special, by, from, or after the death of any his or their Ancestor or Ancestors as Heir, or by Gift of his Ancestor whose Heir he is; which said Ancestor or Ancestors was, is, or shall be indebted to the King, or any other person or persons to his use, by Judgment, Recognizance, Obligation, &c. In every such case, the said Manors, &c. shall be charged, &c. This Statute was made for the benefit of the King in two points: 1. To make Lands entailed liable to the King against the issue in tail for the Kings Debts in the cases aforesaid, where they were not liable. 2. To make Bonds taken by the Officers of the King to the use of the King, as also of Statutes. We cannot deny but that we have Lands of the Conusor, and of the Gift of the Conusor our Ancestor, whose heir we are, who was indebted to the Queen, and yet we are not within this Statute: Was or shall be indebted, shall not be intended after the Gift made; for if he first convey his Land, and afterwards becomes indebted, the same is not within the Statute: and where a mischief is to be remedied by a Statute, the remedy in exposition of the Statute is to be applied according as the mischief doth require: [Shall be] is to be intended of future Debts after the Statute: and in our case, the Father was not Receivor, or other Officer to the Queen: And if this Statute should be so construed, the Father might take 10000l. for the Marriage of his son, and assurance of Lands unto him; and then if he will acknowledge a Debt to the Queen, he should defeat the whole, which should be a very great mischief: The words are, [By Gift after the Debt acknowledged to the Queen.] And he cited the Case, 19 Eliz. Plow. 191. betwixt Ludford and Gretton, upon the Statute of 18 H. 6. the words of which are, [That whatsoever Warrant hereafter to the Chancellor of England addressed, the

day

day of the delivery of the ſame it be entred of Record in the Chancery; and that the Chancellour make Letters Patents upon the ſame Warrants, bearing date the day of the ſaid delivery in the Chancery, and not before: and all Letters Patents made to the contrary ſhall be void.] And the Caſe was, That a Warrant was directed to the Chancellour, for the making of Letters Patents, and delivered to him before the making of them, but the day of the delivery was not entred of Record, &c. And it was holden, that notwithſtanding that, the Letters Patents were good; for the miſchief at the Common Law intended to be reformed by that Act, was not the poſt-dating of the Letters Patents, but the ante-dating, and therefore that ought to be principally taken into conſideration: which miſchief being underſtood, the words of the ſaid Statute are to be applied to it; ipſæ etenim Leges cupiunt, ut jure regantur; i. with an Equity according to the Miſchief, and not always according to the preciſe words: and in that caſe it is ſufficient if the Letters Patents bear date after, and not before the delivery of the Warrant, and that was the matter intended to be reformed. Alſo, as out Caſe here is, we are not within this Statute; for the words are, Of the Gift of his Anceſtour, but here the Son hath not the Lands of the Gift of his Anceſtour, but rather by the Statute of Uſes, and ſo he is in the Poſt and not in the Per, by his Anceſtour; for here the Fine was levied to divers perſons unto the Uſes aforeſaid: and here the Gift was not a mere gratuity to his Son, but in conſideration that he ſhould marry the Daughter of Sir Edw. Huddleſton; and alſo the Father was the King's Debtor after the Gift, and not before.

Popham, Attorney-General, to the contrary: The letter of the Statute is with us, for he comes in of the Gift of his Anceſtour, who was indebted to the Queen: and although that the Gift was by way of uſe, yet the precedents in the Common-Pleas and other Courts are, That he may declare, of the Feoffment of ſuch a one, although it was by way of uſe: and he ſaid, If A. be bound to enfeoff B. of ſuch Lands, if he maketh a Feoffment to the uſe of B. and his Heirs, he hath well enough performed the Condition: and if the Caſe ſhould not be within the Statute, then ſhould that branch of the Statute be idle, and to no purpoſe: For if the Anceſtour be ſeiſed, and becometh indebted to the Queen, and after makes a conveyance ut ſupra, the ſame is provided for by the firſt branch of the Statute: For the Land is liable to the Recognizance or Obligation made to the King, and that they ſhall be as effectual as a Statute Staple; and reaſon requires, that the ſon, who comes in by mere gratuity of his Anceſtour, ſhould be charged: And it was a common practice before the making of that Statute, That the King's Officers would convey their Lands to their children, and then become the King's Debtors; for the remedy of which miſchief the Statute was made, and the Statute of 27 Eliz. doth not reſpect the Heir, becauſe he is Heir, but as a purchaſor onely, and that upon good conſideration: Coke, If any fraud can be found in our Caſe, then without doubt we ſhould be within the Statute, but being upon good conſideration, it is out of the Statute; nor was there any purpoſe in the father when he made the ſaid Conveyance, to become the King's Debtor, or Officer to him, for if there were, then he is within the Statute, alſo the Gift had been a mere gratuity, &c. And afterwards, at another day, the Caſe was moved by Coke, and he ſaid, That here is not any Gift, becauſe it was in conſideration of Marriage, and then no gift, for it is an old Proverb, What is freer than gift? Egerton, The father giveth to his ſon and heir, the ſame is within the Statute, and yet here is conſideration, (ſcil.) of blood; Coke contrary, Where the father giveth to his younger ſon, or to his daughter, which is not his heir; and of that opinion was Manwood, chief Baron: And afterwards, (as Coke reported) the ſon and his Lands were diſcharged.

*Mich.* 26 *Eliz.* In the King's-Bench. *Error.*

## CXV. Amner *and* Luddington's *Case.*

3 Len. 89. 8 Co. 96.

ERror was brought in the King's-Bench by Amner against Luddington, Mich. 25 and 26 Eliz. Rot. 495. The Case was, That one Weldon was seised, and leased unto Pierpoint for ninety nine years, who devised the same by his Will in this manner; I bequeath to my Wife the Lease of my House during her life, and after her death I will that it go amongst my Children unpreferred. Pierpoint died, his Wife entred, and was possessed virtute legationis prædict. and took Husband one Fulshurst, against whom one Beswick recovered in an Action of Debt 140 l. upon which Recovery issued forth a Fieri facias, and upon that a Venditioni Exponas, upon which the Sheriff sold the said term so devised to one Reynolds: Fulshurst died, his Executor brought Error to reverse the Judgment given against the Testator at the Suit of Beswick; the Wife did re-enter, and sold the Land, and died. Alice, an unpreferred Daughter of Pierpoint, did enter, and upon that matter found by special Verdict in the Common-Pleas, the entry of Alice was adjudged lawfull: upon which Judgment Error was brought in the King's-Bench. And it was argued upon the words of the Devise, because here the House is not devised, but the Lease it self, (scil.) all his interest in the thing devised: And it is not like unto the Case betwixt Welchden and Elkington, 20 Eliz. Plow. 519. where the Case was, That Davis being Lessee for years, devised that his Wife should have and occupy the Land demised for so many years as she should live; nor unto the Case of Paramour and Yardley, 21 Eliz. Plow. 539. for there the Lessee devised, That his Wife shall have the occupation and profits of the Lands untill the full age of his Son: For in these two Cases the Land it self is quodam modo devised, but in our Case all the Estate is devised, i. the Lease it self. And also in those two Cases a certain person is assigned and named in the Will, who should take the residue of the term which should be expired after the death of the Wife: But in the Case at Bar, there is not any person certain appointed, &c. but the Devise, as to that, is conceived in general words, to Children unpreferred; therefore neither any possibility, nor Remainder in any person certain, therefore all the term is wholly in the Wife, and then she might well dispose the whole. But all the Court was to the Contrary, and that in this case the possibility should rise well enough to the death of the Wife, to that Daughter unpreferred. Another matter was moved, If the said term, being sold in the possession of the Wife of the Devisor by force of the Execution aforesaid; If now, the judgment being reversed, the sale of the term be also avoided? for now the party is to be restored to all that which he had lost. And it was argued by Coke, That notwithstanding the reversal of the Judgment, the sale did stand good; for the Judgment for the Plaintiff in a Writ of Error is, That he shall be restored to all that which he hath lost Ratione judicii prædict. and the Judgment was, That the Plaintiff should recover 140 l. and therefore by the Judgment in the Writ of Error he shall be restored to so much, but the mean act, (scil.) the sale of the Lease, shall stand, and shall not be defeated or avoided. As 7 H. 6. 42. A Statute Staple is bailed in Ouster le main, the Conusee brings Detinue against the Bailee, and hath Judgment, and recovers the Statute, and upon that hath Execution: The Baylee brings a Writ of Error, and reverseth the Judgment given in the Detinue, yet the Execution shall stand, and Audita Querela doth not lie for the Conusor: And see 13 E. 3. t. Bar. 253. Accountant found in Arrearages

rearages, committed to the next Gaol, escapes, and reverseth the Judgment given against him in accompt, by an Ex parte talis, yet the Action upon the escape lieth; and the Court, as to that point, all agreed; but that point did not fall in Judgment; for by the sale nothing shall pass, but the interest in præsenti, which was in the Wife of the Devisor; but the possibility to the children unpreferred, was not touched thereby; And afterwards the Judgment was affirmed.

*Mich.* 36 *Eliz.* In the Exchequer.

## CXVI. Edwards *and* Halinder's *Case*.

RIce Edwards brought an Action upon the Case against Halinder, and declared, That whereas one Banister had demised unto the Plaintiff a Cellar, to have from week to week, Quandin ambabus partibus placuerit; And also whereas the said Banister had leased to the Defendant a Shop, directly over the said Cellar, there the Defendant had laid so great a burthen upon the floor of the said Shop, that thereby the said floor fell down, and brake certain vessels of the Plaintiff's full of Wine, by reason whereof the Plaintiff lost his Wine, to the value of, &c. to his damages, &c. The Defendant said, That before the charging of the floor, ut supra, The said floor had sustained greater weight; and farther, that the said Banister let unto him the said Shop for to lay there the weight of 30 Tun, and he had laid there but the weight of 12 Tun; and also that the Walls of the said Cellar are so weak, that the floor of the said Shop fell by reason thereof; upon which there was a Demurrer in Law. It was argued by Godfrey for the Plaintiff; Where injury or wrong is done unto any, the Law gives remedy to the party grieved; and although that the Shop was let unto him to lay wares there, which he hath done, and that it was not his intent to surcharge the said Warehouse, although the event be contrary, yet forasmuch as by the laying of wares there, a wrong and damage follow to the Plaintiff, the Defendant shall be punished; for the rule is Sic utere tuo, ut alienum non lædas: If I have a house, and another buildeth so high over me, that rain-water descends and falls from his house upon my house, an Action upon the Case lieth, See F. N. B. 184. So if by his building he stops my light, as it was lately adjudged in the King's-Bench, in the Case betwixt Bland and Mosely: See 6 E. 4. 7. & 8. Damages recovered for a wrong done against the will of the party: and see other Cases upon this Learning, 13 H. 4. t. Action upon the Case 48. The Plaintiff had sold certain trusses of Hay to the Defendant, within such a Meadow, to be carried away from the said Meadow within a certain time; but the Defendant let the Hay lie there without carrying the same away, so it putrified the Meadow, by reason whereof the Plaintiff lost the profit of his Meadow for a great time; and thereupon brought an Action of the Case against the Defendant, and the Action was adjudged maintainable: See 22 E. 4. 8. where the owners of the Plough in turning of the Plough, according to the custome in the common fields upon the Land of another; one of the Plough Cattel, against the will of the driver, takes a mouthfull of Grass, the same is justifiable, but if the driver of the Cattel suffereth the same to continue, an Action will lie against him: So 22 E. 4. 49. Where I am bound to enclose my Land against another, and in default of enclosure, the Cattel of the other escaped into my Land and Close, I shall not punish him; but if he after notice, doth suffer them to continue there, he shall be punished, although it be through my default: Also it is alledged in our Declaration, That the Defendant intending to hurt and spoil the Plaintiff's Wines, did lay such a weight, &c. And the Defen-

See the Case reported in *Popham*'s Reports fol. 46. very short, but not with the Arguments.

Defendant answers thereunto. That the flow fell in default of repairing of the walls of the Cellar, or for the ruinousness of them, where he ought to have pleaded farther, Absque hoc, that the Shop was surcharged with the intent to hurt the Plaintiff's Wines; In an Action upon the Case, upon a Trover, The Defendant pleads, that the goods whereof, &c. were pawned unto him for the security of certain money not yet paid, The same is no plea without saying farther, Absque hoc, that he did convert, &c. See 43 E. 3. 33. In an Action brought against a Smith, for his negligence in curing of a Horse which he took upon him to cure; the Defendant was driven to traverse, Absque hoc, that the Horse perished in default of his care: Dalton contrary, Where in doing of a lawfull Act, by a mishap a damage cometh to another, against the will of the doer, no punishment shall follow: See the Case cited by the other side in 6 E. 4. 7. & 8. If he might have done more than he had done to have prevented the mischief, he should be punished; but if he could not have done more than he hath done, or otherwise than he hath done to prevent it, he is unpunishable, and he may, Uti jure suo, although it be to the prejudice of another: See 12 H. 8. 2. & 3. Harcourt's Case; If I cannot otherwise let the water out of my Land, I may justifie the letting of it in your Land which is adjoining, although that your Land be drowned thereby: Sometimes ignorance of the party shall excuse the offence: As if my Dog worry your Sheep, if I do not know of such ill quality in him, I shall not be punished for the same. And it doth not appear that the Defendant had notice of the ruinousness of the walls, although now it appeareth that they were ruinous, and for that cause the flow fell; for the Defendant said, That the walls were ruinous, in occultis & absconditis partibus ipsorum; And here needs not any Traverse: For it is confessed, That the flow of the Shop was surcharged, but the same is avoided and excused, because that the walls were ruinous, in occultis & absconditis ipsorum partibus; And forasmuch as our Landlord (who is also the Landlord of the Plaintiff,) hath let to us the Shop, to lay there the weight of 30 Tun, therefore the Defendant hath good right, as to such weight against the Lessor of the Plaintiff, and all others, claiming under him. And here the Plaintiff hath declared of a Lease from week to week, Quamdiu ambabus partibus placuerit, and hath not averred the continuance of his Lease, &c. Godfrey, A Lease is made from year to year, ut supra, &c. The Lessor brings Debt for the second year, he need not to aver the continuance of the Lease; for when the second year doth begin, the Lessor cannot put him out that year; But we, upon the matter, have averred the continuance, for we have said, Et sic possessionatus existens, &c. Manwood, The Declaration is, That the Defendant, Nequitur & malitiose intendens, &c. tantum ponderis, was laid upon the flow, Ita quod vi ponderis dirupta fuit contabulatio: And the Plea of the Defendant is, Quod muri in partibus occultis & absconditis ruinosi fuerunt, &c. & ideo corruerunt. So as the Plaintiff speaks of the flow, and the Defendant of the walls, and so the Defendant doth not answer the Plaintiff; for the Shopman ought not to go into the Cellar, nor the Cellar-man into the walls. But Dalton said, That the Plea was, Quod diruptio & fractio contabulationis fuit ex eo quod muri ruinosi fuerunt in partibus occultis & absconditis. At another day, it was argued by Flemming for the Plaintiff, A voluntary and unlawfull act is laid to the charge of the Defendant, who pleads special matter to excuse himself, but doth not answer the point of the Action, but only that the fall was sudden, Et quia muri fuerunt ruinosi in partibus occultis, &c. whereas we have declared, that the weight was the cause thereof: 3 H. 6. Double Plea 31. In an Action upon the Case, for negligent keeping of fire, the house of the Plaintiff was burnt, he ought to take a Traverse, without that, that it was burnt by the ill keeping of the fire of the Defendant; and he needs not to aver the continuance

of

of the Tenancy at will: 38 H. 6. 27. A Leſſee for life aſſigns his Eſtate to B. who Leaſes at will to C. B. is diſſeiſed by D. and C. ouſted, C. re-enters, and brings Treſpaſs, he muſt aver the Life of A. but not of B. nor the continuance of the will. Atkinſon contrary; I conceive there needs no Traverſe, for the matter of the Declaration is expreſly confeſſed, and avoided, 5 H. 7. 12, 13. where one makes Title to common, or Rent by preſcription, if the other pleaded unity of poſſeſſion, he needs not traverſe; ſo where he claims B. for his Villain, &c. B. ſaith, that he is a Baſtard, there needs no Traverſe. We have confeſſed in pleading, Quod gravitate ponderis, the flore fell down; but we ſay farther, that the cauſe was, becauſe the walls were ruinous, &c. and here is matter in Law; Who ought to repair them: The Leaſe was made unto the Defendant, 29 Julii, and the flore fell 30 Julii, the day following: and if by Law the Defendant ought to repair them, it was impoſſible for him to do it, and that ſhall excuſe him: If one hath a Shop, and another a Cellar under it, and the Shop minatur ruinam, there is a Writ in the Regiſter, De reparatione facienda. 153, &c. And it lieth againſt him who ought to repair by preſcription, or by the Law. And we who are the Leſſee, are not bound to repair; for if the ground Timber be in decay, and ſo the houſe ruinous at the time of the Leaſe, it is a good Plea in an Action of Waſte, if the houſe fell in ſuch defect; for the Leſſee is not bound to ſuch reparation, (ſcil.) for great timber, which was rotten at the time of the Leaſe. But if after the Leaſe it becomes rotten for want of covering, it is otherwiſe, See 12 H. 8. 1. And here the Plaintiff hath remedy againſt his Leſſor, for he is bound to the reparations by the Law, and not the Leſſee; And as he may have the ſaid Writ, De reparatione facienda, before the miſchief, ſo he may now have after the miſchief: and therefore no Law binds the Defendant to repair; Nor is there any cuſtome pleaded to that purpoſe: and alſo for as much as the occaſion of the Cauſe of action was the ruinouſneſs of the walls, the Defendant ſhall not be charged with the ſame: And alſo he ſhall not be charged with a thing he could not prevent. Manwood, The Defendant hath pleaded, that the fall of the flore was, eo quod, the walls were ruinous in partibus occultis, which was a ſecret thing, and unknown unto the Defendant, upon which the Plaintiff hath demurred, and ſo confeſſed the plea of the Defendant to be true; and that he was ignorant of the feebleneſs of the walls, and therefore he needs not any Traverſe. And here the Defendant hath pleaded, That the Shop was demiſed to him for greater carriage. Gent, Baron, was of opinion, That the Defendant had not fully anſwered to the Declaration; for he is charged with the laying of ſo much weight upon the flore there, ſo as, vi ponderis, it fell down; To which the Defendant hath ſaid, That the walls were ruinous, in occultis partibus; and doth not anſwer to the ſurcharging, (ſcil.) Abſque hoc, that he did ſurcharge it: Clark, Baron, It is a general Rule, That every material thing alledged in the pleading, ought to be traverſed, confeſſed and avoided, which the Defendant hath not done here but he would excuſe himſelf through the default of another, and anſwer nothing to that with which he himſelf is charged; And afterwards Judgment was given in the Court of Exchequer for the Plaintiff. Whereupon, afterwards, the Defendant brought a Writ of Error in the Exchequer Chamber, where the Caſe was argued again; But there the Judgment given in the Court of Exchequer was affirmed. See this Caſe reported ſhort, in Popham's Reports lately publiſhed.

Trin

*Trin.* 31 *Eliz.* In the Common Pleas.

## CXVII. Linacre *and* Rhode's *Case.*

Co. Rep. Blomfield's Case. 3 Len. 230.

THE Case was, That Linacre was bound in a Statute; and his body taken in Execution, and the Sheriff voluntarily let him at large, and afterwards the Conusee sued Execution of the Lands of the Conusor; who thereupon brought an Audita Querela. It was moved by Yelverton, Serjeant, That by that voluntary discharge of him by the Sheriff, the whole Execution was discharged, for the Execution is intire: See 15 E. 4. 5. Where the Conusee in a Statute Merchant, hath the body and lands of the Conusor in Execution, and afterwards the Conusee surrendreth his Estate which he hath by Extent; now the Execution of his body is discharged; and the Conusor shall have a Scire facias, or Audita Querela to discharge his body: So if three Conusors be in Execution, and the Conusee doth discharge one of them, the same is a discharge of them all, and in the principal Case, the body is the principal, and therefore the discharge of the principal part of the Execution is the discharge of the whole. Hammon, Where the Conusee himself dischargeth the Execution in part, it is good for the whole, but where discharged by the Sheriff, Nihil operatur: Anderson, If the Conusor dieth in Execution, yet the Conusee shall have Execution against his heir of his land, for the having of the body in Execution, is not any satisfaction to the party; for his body is but a pledge until the money be paid; and there is no reason, that the act of the Sheriff should discharge the Execution. Windham, to the same intent; And if the Conusee sueth Execution, and hath the body of the Conusor in Execution this day, he may the next day sue Execution of the lands, and the next day after, of the goods; and if the Conusee doth discharge the body, the whole Execution is discharged, and it is true, That if A. recovereth against B. in an Action of Debt, and B. is taken by a Capias ad satisfaciendum, and afterwards the Sheriff permitteth B. voluntarily, to escape, here B. is discharged, although it be not the act of the party; for there the Plaintiff had a full Execution, which is not here; for in Case of Execution upon a Statute-Merchant, the Execution by the body is not the full Execution, and therefore although the Sheriff hath discharged the body, yet the Conusee may have Execution of the goods and lands, but not of the body; and afterwards Judgment was given against the Plaintiff; That the Audita Querela did not lie, and that Execution might be sued of the goods and lands but not of the body.

*Trin.* 32 *Eliz.* In the Common Pleas.

## CXVIII. Webbe *and* Mainard's *Case.*

IN Ejectione firmæ, The Case was, Walter Goldsmith, seised of certain lands, made a Feoffment to the use of himself for life, and after to the use of John his eldest son in Fee; Proviso, That after his death, his said son shall pay unto his younger son, William, 30l. by 3l. per ann. at the Feast of St. Michael until the entire sum be paid, and if he fail of payment, then to the use of the said William and his heirs; Will. Goldsmith the Feoffor dieth, the money is not paid, but afterwards the said younger son makes an Acquittance, and thereby acknowledgeth the Receipt of the said money, according to the Proviso, John dieth; Now, if the younger son may enter? And first, if the younger

younger ſon be concluded by that Acquittance, to ſay that the 30l. was not paid? And if he be not concluded, Then if becauſe that the words are but words of limitation, the younger brother hath Title of Entry? and then, if this Entry be bound by the deſcent from John to his Heir? or if John by continuance of the poſſeſſion, after the breach of the Proviſo, be a Diſſeiſor, or not? were Queſtions propounded to the Court, which the Court took time to conſider of, yet it was then ſaid, That the uſe was ſettled in William, and the poſſeſſion executed unto it, but not ſuch a poſſeſſion upon which an Aſſiſe or Treſpaſs lieth.

*Hill.* 31 *Eliz.* In the King's Bench. *Rot.* 647.

## CXIX. Willis *and* Jermine's *Case.*

IN Ejectione firmæ, It was found by ſpecial Verdict, That the Dean and Chapter of Exeter Leaſed the Land, where, &c. to Jermine, rendering Rent to be paid at their Chapter-houſe at Exeter, and for default of payment, that ſuch Leaſe ſhall be void and ceaſe; and that the ſaid Jermine conveyed his intereſt to the Defendant, and afterward the Rent was demanded at the Chapter-houſe, but not paid; and afterwards, The Dean and Chapter, by the name of Dean and Chapter of St. Mary of Exeter, where they are incorporate by the name of Dean and Chapter of St. Mary in Exeter,) make an Indenture of Leaſe for forty years, in their Chapter-houſe to Willis, and thereunto put their ſeal in the Chapter-houſe, and made a Letter of Attorney to another to enter, and to make Livery of the ſaid Deed, which was done accordingly: it was moved by Harris, Serjeant, That this Leaſe made in manner, &c. is not good, for the Corporation is miſnamed, i. of Exeter, for in Exeter; but the Court diſallowed that Exception; for there is not any material variance, and ſo it was ſaid, it hath been ruled. And he ſaid, that for another cauſe the Leaſe is not good; for when the Dean and Chapter in their Chapter-houſe make this Indenture of Leaſe, and ſet their Chapter-ſeal to it, It was their Deed preſently, without other delivery: and then Jermine being in poſſeſſion at the time of the putting of the ſeal to it; they were out of poſſeſſion thereof, and ſo the new Leaſe void, becauſe they were not in poſſeſſion at the time of the making of it; for no delivery is neceſſary to the Deed of a Corporation; but the date of the ſealing of it, makes it a perfect Deed, and then the delivery of the ſame by the Attorney is of no effect. Wiat to the contrary, This Leaſe is good: For Jermine was but Tenant at ſufferance at the time of this Leaſe; but if Jermine had been a Diſſeiſor, then delivery in the Chapter-houſe was void, and then the ſecond delivery upon the land good. And Harris agrees, That if Jermine be but Tenant at ſufferance, then the ſecond Leaſe made of the land was good enough. But it was agreed by the whole Court, That the Leaſe is good enough for the manner, and there is not other form or means for a Corporation to make a Leaſe than this here: And it was moved; That the firſt Leaſe was not utterly ceaſed without entry, and then the new Leaſe being made before, entry is void; But Wray was clear of a contrary opinion; and ſaid, That the Dean and Chapter might make ſuch a Leaſe before entry; But Gawdy, Juſtice, doubted of it, Vide 28 H. 8. 6. Dyer and Com. 2. and 3. Ph. and Ma. 132. Browning and Beſton's Caſe.

1 Cro. 167. Roll Tit. Eſtate 830.

Davis Rep. 42.

Harris The Attorney hath not purſued his Authority, for his Warrant is to enter into the Land in the name of the Corporation, and claim it to their uſe, and then to deliver the Leaſe made upon the land;

but the Jury have not found ſuch matter, but have found onely that he came by virtue of the ſaid Letter of Attorney, and delivered the ſame upon the Land, but do not find that he entred, and claimed the ſame to the uſe of the ſaid Dean and Chapter, But the Court held the ſame good enough; for in a ſpecial Verdict, every particular circumſtance need not to be found, and in pleading it ought to be; and becauſe it is found, That the Attorney, by virtue of the ſaid Warrant of Attorney, hath delivered the Deed upon the Land, he hath purſued his Warrant in all. Gawdy, Delivery of the Deed is as neceſſary in caſe of a Corporation, as it is in the caſe of other perſons.

*Trin.* 31 *Eliz. Rot.* 768. In the King's Bench.

## CXX. Rymerſly *and* Cooper's *Caſe.*

1 Cro. 168, 169. IN an Action upon the Caſe, for ſlanderous words, the Plaintiff declared, That where, by the cuſtome of the City of London, it hath been uſed, If the Mayor, Recorder, or any Alderman, being a Juſtice of Peace there, might take the Depoſition of any perſon produced before them, or any of them to be depoſed in perpetuum rei memoriam ex parte alicujus perſonæ, which Depoſitions are there recorded, in perpetuam rei memoriam; and are good matter to be given in Evidence to any Jury there to inform their conſciences of the truth of the thing in Queſtion, and declared farther, That he himſelf was produced before one Bond, as a Witneſs to teſtifie his knowledge in quadam cauſa ibid. ex parte Edw. Stapleton, before whom he depoſed, &c. The Defendant ſpake theſe words in ſcandal of the Plaintiff, Rymerſly was forſworn in the ſaid oath before, &c. The Defendant pleaded, That the Plaintiff made not any ſuch oath, and upon that the Plaintiff did demur in Law. George Crook prayed Judgment for the Plaintiff, for the ſame is no plea; for the oath is but an Inducement, and therefore not traverſable; for the ground of the Action is the ſpeaking of the words; and admit there were not any ſuch Oath taken by the Plaintiff, the offence of the Defendant was the greater, Nam peccavit in utroque, tam in juramento, quod nullum omnino fuit, quam in perjurio, quod ſine juramento eſſe non potuit; for if one ſaith, A. Murdravit J. S. whereas there never was any ſuch J. S. yet the Action lieth for the ſcandalous words: Alſo this Plea doth amount but to the general iſſue, See 4 E. 6. Action, Sur le Caſe 113. 34 H. 6. 28. And as to the words, they are Actionable; for (forſworn) amounts to purjured, being ſpoken upon an oath taken in a Court of Record, and ſo was it lately holden in the Caſe betwixt Brook and Doughty: Godfrey, Contrary, The Declaration is not good, for the cuſtome in London is not well laid, or purſued; and therefore, upon the matter, it is but an oath taken before a private man; for he hath declared, That in the City of London, it hath been uſed, &c. but doth not ſay, That the City of London is Antiqua Civitas, as he ought. See the Caſe of the Prior of Lantony, 12 E. 4. 8. and 22 H. 6. Preſcription, 47. If a man alledgeth a cuſtome within a Town, he ought firſt preſcribe, That the ſaid Town is an ancient Town. Alſo it is not ſet forth in the Declaration: That Bond, at the time of the Depoſition taken, was a Juſtice of Peace in London, and then the cuſtome is not well perſued. But afterwards, the Record was looked upon, and allowed to be good by the Court, and the Court conceived, that the Plea of the Defendant was good enough, as 13 E. 4. 8. In Debt againſt an Abbat, the Plaintiff counted upon a borrowing by the predeceſſor, &c. the Defendant pleaded, That he did not borrow, and it was holden a good Plea, and yet the Plaintiff in ſuch Caſe might plead the general iſſue, See 26 H. 8.

Brook and Doughtie's Caſe.

26 H. 8. and 34 H. 6. Br. Action Sur le Case, 103. 3. Ma. Dyer. 121. The Lord Mounteagle's Case, 34 H. 6. 43. by Moile. In Trespass, Quare servientem suum verberavit, &c. It is a good Plea, to say, That he was not the servant of the Plaintiff; and if in the principal, the Defendant plead, Not guilty, he should thereby confess, that the Plaintiff was sworn. Wray, chief Justice, The Plea of the Defendant is good: And it was moved by Egerton, Solicitor general, That the custome to take Oath, as is alledged, is not allowable, because it is not a reasonable custome, that such Depositions should be taken, in perpetuam rei memoriam, If there be not a suit depending in the Cause; and because that such custome not alledgable, it is not reasonable, and then the Plaintiff ought not to have Judgment; and such also was the opinion of Wray and Gawdy, Justices, But for the default in the Declaration, That it is not alledged, That London is antiqua Civitas, Judgment was given against the Plaintiff.

*Trin.* 31 *Eliz. Rot.* 901. In the King's-Bench.

## CXXI. Alexander *and* Dyer's *Case.*

IN Debt for Rent reserved upon a Lease for years, The Plaintiff declared, That he leased to the Defendant 37 Sept. certain Lands, to have and to hold from the Feast of St. Michael next ensuing, for a year, rendring 10 l. Rent, Virtute cujus, 29 Sept. the said Lessee entred, and enjoyed the said land, from the Feast of St. Michael, all the said year; and because the Rent was behind, &c. And upon Nihil debet pleaded, it was found for the Plaintiff. It was moved in Arrest of Judgment, that upon the Plaintiffs own shewing, here is no Rent behind, and then no cause of Action; for it appeareth in the Declaration, that the Lessee entred 29 Sept. which is before the Term begins; For the words of the Habendum are, From the Feast of St. Michael, therefore the Feast of St. Michael is no part of the Term, and then was the Defendant a Disseisor, and the day after, the Term began, which cannot alter his Estate, but that he continueth a Disseisor, and then he is not in by force of the said Lease, and so no Rent can be due: Williams, As the Declaration is here, the same is not any disseisin; for the Plaintiff set forth in his Declaration, That the Lessee, the Defendant hath occupied the Land demised, the whole year, and so hath not admitted any Disseisin, it being in his election to make it a Disseisin or not: Clench, Justice, Be it a Disseisin or not, or be it that the Defendant entreth or not, he is to pay the Rent: Gawdy, The Lessee is a Disseisor, and continueth a Disseisor, and yet Debt lieth against him for the Rent, by reason of the privity of Contract: which see Rysden's Case, 24 H. 8. Dyer 5. And so in our Case, Quod fuit concessum per totam Curiam, and afterwards Judgment was given for the Plaintiff. 1 Roll. 605. 1 Cro. 169.

*Hill.* 32 *Eliz.* In the King's-Bench. *Rot.* 561. *Error.*

## CXXII. Monings *and* Worley's *Case.*

IN Debt upon an Obligation brought by Mary Worley, against Monings in the Common-Pleas. The Condition was, That if Mary Worley the Plaintiff in the said Action doth not depart out of the service of the Defendant without license of the Defendant Monings, nor marry her self, but with his consent, Then if the Defendant shall pay to the said Mary within twenty eight days after demand by her made (of Monings) at his house at Walderſey, 100 l. That then, &c. And the Defendant

fendant in the ſaid Action pleaded, That the ſaid Mary the Plaintiff, in the ſaid Action, 4 Maii, 30 Eliz. departed out of his ſervice without licence, The Plaintiff Mary, by Replication ſaid, That 6 Septemb. the ſame year ſhe departed out of his ſervice with licence, and that 4 Octob. after, ſhe demanded the ſaid 100l. at Walderſey aforeſaid, and he refuſed to pay it, Abſque hoc, that ſhe departed out of his ſervice 4 Maii, 30 Eliz. without licence, and the Writ bare date, 18. of October, next after the demand; And it was found for the Plaintiff, and Judgment given for her in the Common-Pleas; and now a Writ of Error is brought by Monings. Tanfield, The Judgment ought to be reverſed; for always the Replication in ſuch caſes, ought to contain ſufficient Cauſe of Action, and ſufficient breach of the Condition, or otherwiſe the Plaintiff ſhall not have Judgment, although that the Iſſue be found for him: as 7 E. 4. 31. In treſpaſs for taking of goods, of A. and B. A. pleads Not guilty, B. juſtifies, the Plaintiff makes Title to the goods by a gift, B. traverſeth the gift, and it is found for him againſt the Plaintiff, A. is found guilty: Now, although A. be found guilty, yet the Plaintiff ſhall not have judgment againſt him; for it is found, that he hath not any Title to the goods. As in Debt upon a Bond againſt A. and B. A. pleads Non eſt factum; B. pleads the releaſe of the Plaintiff, and it is found the Deed of A. and that the Plaintiff hath releaſed to B. the Plaintiff ſhall never have Judgment; for upon the Verdict, it appears, that he hath not cauſe of Action: And here in the Replication, there is not a ſufficient breach ſhewed of the Condition; for although that Mary hath not departed from the ſervice of the ſaid Defendant, yet the ſame is not material; but the Defendant had twenty eight days after the demand, to pay the 100l. but the ſame is not ſo here, for the Plaintiff hath prevented the Defendant; for the demand is alledged to be 4. Oct. and the Writ bears date 18. Octob. the ſame year, and ſo the Defendant had not his time allowed him. Gawdy, The iſſue is taken upon the departure out of his ſervice, ſo as the demand is not now material, and therefore the alledging of the ſame is ſurpluſage, and ſhall not hurt: And the Defendant hath pleaded in Bar, the departure of the Plaintiff out of his ſervice, upon which he relieth, and the demand ſet forth in the Replication, is not to be regarded, as to prejudice the Plaintiff: As 3 Ma. Dyer 115. Leſſee for years covenants that he will not cut any Trees, The Leſſor aſſigns the breach of the Covenant in ſuccidendo twenty Oaks, The Leſſee pleads, that he did not cut the twenty Trees, nor any of them; The Jury found, that the Defendant had cut down ten Trees, The Plaintiff upon that Verdict ſhall have Judgment, for the reſt is but ſurpluſage; and more put in iſſue than there needs to be. Fenner, It is not any full Plea to ſay, That the Plaintiff did not depart out of the ſervice of the Defendant 4 Maii, for if ſhe departeth at any other time, ſhe ſhall not recover, for which cauſe ſhe ought to have pleaded, That ſhe continued in his ſervice untill ſuch a day, and then ſhe departed with his licence, and the inducement to the traverſe ought to be ſufficient matter, otherwiſe it is not a full Plea, nor the Traverſe is not good. And if it be ſurpluſage, yet if it be not matter againſt her ſelf, it makes the Plea naught, which ſee 1 H. 7. 29. 6 H. 7. 16. Gawdy conceived, that the Judgment was well given, for the Defendant was at his liberty to plead the departure of the Plaintiff without his licence, or to ſtand upon the demand. And now, although he pleads the departure, yet the demand is not confeſſed. And afterwards the Judgment given in the Court of Common-Pleas was affirmed.

27 *Eliz.* In the King's-Bench.

## CXXIII. Baſhpool's *Caſe.*

THE Caſe was this, The Father ſeiſed of Lands, is bound in an Obligation, and deviſeth his Lands to his Wife untill his Son cometh to the age of twenty one years, the remainder to the Son in Fee, and dieth; and no other Lands deſcend or come to the Son from his Father. It was moved by Godfrey, That the Heir in that caſe at his Election might wave the Deviſe, and take by deſcent, or è contra: See 9 E. 4. 18. by Needham. But Gawdy and Shute, Juſtices, were of opinion, That the Son ſhould be adjudged in by Deſcent: Clench contrary. Stiles Rep. 148. 3 Len. 118.

*Trin.* 30 *Eliz.* In the King's-Bench.

## CXXIV. Bennet *and* Shortwright's *Caſe.*

THE Caſe was, The Defendant ſued the Plaintiff in the Spiritual Court for Tythes in kind, and now the Plaintiff prayed a Prohibition, and ſuggeſted, That they had uſed in the ſaid Pariſh, time out of mind, &c. to take the tenth Sheaf in ſatisfaction of Tythe of Corn, &c. and in thoſe years in which the Plaintiff had ſuppoſed the ſubtraction of his Tythes, he had ſevered the tenth Sheaf from the nine parts, and the Parſon would not take them away: and that he had offered that matter by way of Plea in the Spiritual Court, but they there would not allow of it: And the Court was clear of opinion, That the ſuggeſtion was good; for if the Pariſhioner ſetteth out his Tythes, and the Parſon will not take them, or if they be deſtroyed by Cattel by his Laches, he ſhall not have Tythes again: and therefore if the Eccleſiaſtical Court will not allow that Plea, it is reaſon that the party have a Prohibition, for after ſeverance tranſit decima in Catalla: But it was ſaid by the Court, That if the Pariſhioner doth ſet forth his Tythes, and takes them again, he may be ſued for Tythes in the Spiritual Court, and the ſetting forth ſhall not excuſe him. 1 Cro. 206.

*Mich.* 32 *Eliz.* In the King's-Bench.

## CXXV. Walter *againſt* Pery *and* Springe.

WAlter brought a Scire facias againſt Pery and Springe, Sureties for one Brook upon Bail in an Action of Debt: The Defendants pleaded the death of Brook before Judgment given againſt him: And all the Juſtices (except Wray) held, that the Plea was not good, for it is a ſurmiſe againſt the Judgment; for Judgment cannot be given againſt a dead man. Wray, The ſame is Error in fact, and of ſuch Error the party may have advantage in this Court. Gawdy, The Surety cannot take advantage of Error, nor plead it, for he is a ſtranger to the Record. Wray, He may plead, that the Defendant is dead after the Judgment, quod fuit conceſſum: but it was ruled, That the Defendants ſhould be ſworn that their Plea was true.

*Mich.*

*Mich.* 32 *Eliz.* In the King's-Bench.

## CXXVI. Alderſley *and* Duparrie's *Caſe.*

IN Debt upon an Obligation bearing date 4. Julii, 30 Eliz. The Defendant pleaded, that it was endorſed with condition to pay 50 li. before 15 Octob. 31 Eliz. and pleaded, that he had paid it before the 15. of Octob. aforeſaid, ſcil. the ninth of June, 30. Eliz. which is three Weeks before the date of the Obligation, upon which the Action is brought: And they were at Iſſue, That the Defendant Non ſolvit before 15 Octob. &c. And the Jury have found, That the Defendant had not paid it before 15 Octob. and that matter was aſſigned for Error; for that Plea is contrary and repugnant in it ſelf, to alledg the payment before the date of the Obligation: But it was moved, That here the day of payment is not material, and but matter of ſurpluſage; for the Iſſue is, Whether the Defendant paid the money before the 15. day of October? and the Jury have found the negative, ſo as the day in the Scilicet is not material, and the alledging of that is matter of ſurpluſage: As 20 H. 6. 15. Treſpaſs Quare clauſum fregit, & herbam conſumpſit, continuand. tranſgreſſ. from ſuch a day uſque ad diem impetrationis brevis prædict. Scilicet, 14 F. 17 H. 6. whereas the date of the Writ fuit 12. Octob. 17 H. 6. ſcil. the October before February: But it was not allowed; for the day of the Writ brought is certain enough, and the miſtaking in the Scilicet is not to any purpoſe. Wray, Payment before the day is not a good Plea, if he doth not ſhew the day and place. It was adjourned.

*Trin.* 31 *Eliz.* In the King's-Bench.

## CXXVII. Parker *and* Burton's *Caſe.*

IN an Action upon the Caſe for ſlanderous words, (ſcil.) That the Plaintiff was perjured: The Defendant doth juſtifie, That whereas a ſuit was proſecuted in the Exchequer-Chamber at Weſtminſter betwixt the Defendant and another, and from thence a Commiſſion was awarded out of the ſaid Court to divers perſons, to examine certain Witneſſes at B. in Berk. and there, by virtue of the ſaid Commiſſion, the Plaintiff was depoſed, & falſe depoſuit, prætextu cujus, he ſpake the ſaid words. The Plaintiff replicando ſaith, De injuria ſua propria abſque tali cauſa: upon which Iſſue was joined, and tried in Berk. and found for the Plaintiff. And it was moved by Coke in Arreſt of Judgment, That the ſaid Iſſue ought not to be tried in Berks. onely, but by both Counties Mid. and Berks; for all the matter of juſtification doth ariſe out of both Counties; the Suit and the Commiſſion which was in Midd. and the Execution of the Commiſſion and the Oath which were in Berks; all which matters is but one Caſe: as 2 H. 7. 3. and 4. Atkinſon, The Trial is well for the manner, for the matter of the juſtification is the Perjury, and the Suit and Commiſſion are but induction and conveyance to the Action: And the Defendant hath not ſhewed, that the Exchequer-Chamber is in the County of Midd. as he ought: As where a man pleads a thing done in any Court, except in the Common-Pleas, he ought to ſhew in what County the ſaid Court was at the time that ſuch thing was done, for Communia Placita teneantur in loco certo. Gawdy and Wray, When the Defendant doth juſtifie by reaſon of the Perjury, and the Plaintiff replies without ſuch cauſe, the ſame amounts to as much as if he had traverſed the Perjury,

Antea 811.

jury, which being ſuppoſed to be committed there, ſhall be tryed there. Coke, It was the Caſe of one Loveday, 25 Eliz. In an Action upon the Caſe for ſlanderous words, the Defendant did juſtifie, by reaſon of a Robbery committed by the Plaintiff in another County; and the Plaintiff pleaded De ſon tort demeſne ſans tiel Cauſe: the ſame ſhall be tryed by both Counties: See 2H.7.3. Alſo it was moved, that here it is not ſhewed in what County the Exchequer Chamber is: Admit that it be in Berks, yet it ought to be tryed by both Counties, and that was Chelderlie's Caſe: And although it be not ſhewed in what County the Exchequer Chamber is, the Plaintiff had Judgment to recover, and the Tryal was held good enough.

*Hill.* 31 *Eliz.* In the King's Bench.

## CXXVIII. *Sir* Tho. Bacon's *Caſe*.

A Writ was awarded out of the Court of Admiralty againſt Sir Thomas Bacon and Sir Thomas Heyden, to ſhew cauſe, (whereas the Earl of Lincoln, late High Admiral of England, had granted to them by Letters Patents, to be Vice-Admirals in the Counties of Norfolk and Suffolk,) why the ſaid Letters Patents ought not to be repealed and annulled: and ſo the ſaid Writ was in the nature of a Scire facias. And now it was made by Coke, That although the Admiral had but an Eſtate for life, yet the Patents did continue in force after his death: As the Juſtices here in the Common Pleas, although they have their places but for life, yet they may grant Offices which ſhall be in force after their deaths, &c. And becauſe this matter is determinable at the common Law, he prayed a Prohibition, for in the Admiral Court they will judge according to the Civil Law: and the Court gave day unto the other ſide, to ſhew cauſe unto the contrary, or otherwiſe a Prohibition ſhould be awarded. Poſted 114.

*Mich.* 31 *Eliz.* In the King's Bench.

## CXXIX. Weſhbourn *and* Mordant's *Caſe*.

IN an Action upon the Caſe, the Plaintiff declared, That whereas he was poſſeſſed of a parcel of Land called the Parſonage, lying adjoyning to a certain River, from the 29 of May, 29 Eliz. untill the day of the bringing of this Writ, the Defendant had the ſaid twentieth day of May ſtopt the ſaid River with certain Loads of Earth, and ſo it continued untill the fourteenth day of February, by which his land was drowned, and ſo he had loſt the profit of it by that time. And it was moved in Arreſt of Judgment, That upon the Declaration there doth not appear any cauſe of Action, for the Plaintiff hath made Title to the Land drowned from the twentieth of May, ſo as that day is excluded, and the Nuſance is ſaid to be made the twentieth day, and ſo it appeareth the Nuſance was before the poſſeſſion of the Plaintiff; and if it were ſo, then cannot he complain of any wrong done before his time: To which it was anſwered, That although the ſtopping was made before his poſſeſſion, yet the continuance of the ſame is after, and a new wrong, for which an Action lieth: as 5H.7.4. It was preſented, That an Abbat had not cleanſed his Ditch, &c. by reaſon of which the Highway is ſtopt: The Succeſſor ſhall be put to anſwer to the ſaid Indictment, by reaſon of the continuance of it: And ſee, that continuation of a Nuſance is as it were a new Nuſance, 14 and 15 Eliz. 320. And it may be that the Plaintiff was not damnified untill

1 Cro. 291.
1 Len. 247.
3 Len. 174.

untill long time after the twentieth day of May, (scil.) after the stopping: And the words of the Writ here are satisfied and true: And afterwards Judgment was given for the Plaintiff.

*Pasc.* 31 *Eliz.* In the King's- Bench.

## CXXX. Trusto *and* Ewer's *Case.*

1 Cro. 23. IN this Case it was agreed for Law, That if a Controversie be betwixt two for the Title of a Lease for years, and they submit the matter to Arbitrement: and the Arbitrators award, that one of them shall have the term: the same is a good Gift of the interest of the term: See 12 Ass. 25. 14 H. 4. 19. 24. But if the Award be, that the one shall permit the other to enjoy the term, the same is no Gift of the interest therein: See, as to the Arbitrement, 9 E. 4. 44.

*Pasc.* 32 *Eliz.* In the King's Bench.

## CXXXI. Andrew's *Case.*

1 Cro. 214. IN the Case of Andrews of Grays Inn, it was holden by Gawdy and Fenner, Justices, That if a Lease for years be made by Deed indented with these words, demisi & ad firmam tradidi; That upon that Writ of Covenant lieth against the Lessor, if he himself entreth upon the Lessee; but contrary if a stranger enter, if it hath not clause of Warranty: For by Fenner, when Covenant is brought upon that word Demisi, the Plaintiff shall recover the term it self, but not damages, and that cannot the Plaintiff do when a stranger entreth; and that was holden for clear Law: See 9 Eliz. Dyer 257. A covenant against the Heir in such case.

*Hill.* 32 *Eliz. Rot.* 549. In the King's Bench.

## CXXXII. Bigg *and* Clark's *Case.*

IN an Action upon the Case in the Court of Hertford, the Plaintiff declared, How that the Defendant hired a Horse of the Plaintiff to carry three Bushels of Coals from Ware to his House in Hertford, and that the Defendant in consideration thereof did promise the Plaintiff, quod ipse in via prædicta nollet onerare the said Horse aliter, than with the said three Bushels of Coals: And the Plaintiff said, That the Defendant had loaded the said Plaintiff's Horse with a greater weight than with the said Coals, and so had hurt his Horse, upon which the Plaintiff recovered: And Error was brought, and the Error assigned was this, That it is not specially shewed, how the Defendant aliter loaded the said Horse, with what thing: As 19 H. 6. In Debt against Executors, they plead, That they have onely expended such a sum of the Goods of the Testator in Funeral expences, absque hoc, that they have administred aliter, vel alio modo; the Plaintiff cannot Reply and say, that they have administred aliter, vel alio modo, without shewing how. Another Error was assigned, because it is not certainly shewed, how the Horse was hurt; but that Exception was not allowed, for it is not the point of the Action: but for the first matter, the Judgment was reversed,

Trin.

*Trin.* 32 *Eliz.* In the King's Bench.

## CXXXIII. Toley *and* Windham's *Case.*

IN an Action upon the Case, the Plaintiff declared, That whereas certain controverſies were betwixt the Plaintiff and Defendant for the profits of certain Lands which the Father of the Defendant had taken in his life time: and whereas he had brought a Writ of Subpœna out of the Chancery againſt the Defendant for the ſaid profits taken by the Father of the Defendant in his life, intending to put in a Bill againſt the Defendant in the ſaid Court: The Defendant, in conſideration that the Plaintiff would ſtay his intended Suit, promiſed, That if the Plaintiff can prove, that the Father of the Defendant took the profits, or had the poſſeſſion of the ſaid Land under the Title of the Father of the Plaintiff, that he ſhould pay to him for all the ſaid profits: And farther declared, That he had proved, that his Father had taken the profits under the Title of the Father of the Plaintiff. Coke took up Exception to the Declaration, becauſe it is not ſhewed, how and by what means, under the Title of the Father of the Plaintiff, he took the profits, as by Leaſe, for that is traverſable. Gawdy, Juſtice, The Son hath not any cauſe of Action or Suit for the profits taken in the time of the Father, therefore the ſtaying of Suit ariſing from ſuch matter is not any conſideration: But as to the other Exception, becauſe it is not ſhewed how, and by what Title he took the profits, it is well enough. As unto the other Exception, it was moved at another day, that there was a Caſe betwixt Stone and Withypool; An Infant promiſeth to pay a ſimple Contract, and thereupon there was a Suit in the Chancery, but it was holden that it was not maintainable, for the promiſe was void, becauſe there was no conſideration. And it was agreed by all the Juſtices, that this Action would not lie; for the Plaintiff hath declared, That where certain Controverſies were betwixt the Father of the Defendant and him, (ſcil.) the Plaintiff himſelf, for the profits of certain Lands, which the Father of the Defendant had taken in the time of the Father of the Plaintiff, &c. and he doth not ſhew, that he himſelf is Heir or Executor of his Father, and therefore the Chancery cannot give him any remedy: And on the other ſide, if the Plaintiff had any remedy, the ſame ought to be againſt the Executors of the Father of the Defendant; and the Plaintiff hath not alleged, that the Defendant is Executor to his Father, and therefore he hath not any colour of Suit againſt him, nor therefore is there any conſideration. Fenner, The Defendant by the Law is not chargeable, nor in conſcience, upon this matter he ſhall be charged; for by the ſame reaſon he ſhould be charged for the ſimple Contract of his Father, and a promiſe to pay it will not bind him: And afterwards Judgment was given againſt the Plaintiff.

1 Cro. 206. 3 Len. 150.

Stone and Withypool's Caſe.

*Trin.* 32 *Eliz.* In the King's Bench.

## CXXXIV. Veal *and* Robert's *Caſe.*

IN an Ejectione Firmæ, the Plaintiff declared, How that John Veal leaſed to him, 30 Eliz for twenty one years ten Acres of Land called M. The Defendant pleaded, That before the Demiſe and Ejectment, one John Roberts was ſeiſed of the ſaid ten Acres called M. in Fee, and 14 Eliz. demiſed the ſame to one John Cox for life, and afterwards 25 Elizab.

1 Cro. 199.

John Roberts dyed, and the Reversion descended to the now Defendant; Cox demised the Land to John Veal for thirty years, who leased unto the Plaintiff, as in the Declaration, of which he was possessed quousque, &c. Cox dyed 30 Eliz. after whose death the Defendant entred and ejected prout was lawfull for him to do, &c. The Defendant by replication saith, That before John Roberts had any thing, one Wall of P. of Glocester was seised of the said ten Acres inter alia, and 29 H. 8. demised to John Veal, Father of the Lessor of the Plaintiff, the said Land inter alia, by the name of two Messuages and two Yard Lands in the County of Glocester, nuper in tenura J. S. and of two other Houses in a Yard Land tunc in tenura E. H. nec non de ten acres vocat. M. lying inter C. & J. tunc in occupatione E. W. for term of years yet during, Habendum dict. four Messuages and three Yard Lands, in tenura J. S. & E. H. nec non the said ten acres to the said John Veal, à tempore mortis sursum redditionis forisfactur. vel determinationis status vel terminor. prædict. J. H. & W. in eisdem, for sixty years; by force of which he was possessed of the interest of the term aforesaid: and afterwards 14 Eliz. the Estate of the said E. W. in the said ten acres ended, for which the said John Veal entred, and 25 Eliz. dyed intestate; and Administration was committed to J. S. Lessor of the Plaintiff, by force of which he entred, and Leased to the Plaintiff, and so he was possessed untill ejected: The Defendant did rejoyn, and said, That long before John Roberts had any thing, William Roberts was seised in Fee, and enfeoffed the said John Roberts before the Ejectment supposed, who demised unto John Cox, and so as in the Bar, absque hoc, That the said Abbat demised to the said John Veal, modo & forma prout the Plaintiff replicando allegavit, the which matter he is ready to aver, & petit Judicium: The Plaintiff said, That the Abbat demisit ut supra, & hoc petit quod inquiratur per patriam: and it was found for the Plaintiff. And it was objected by Snag, That this issue was not well taken, for the Estate of John Veal was not to begin before all the Estates, being in esse at the time of the making of the Lease by the Abbat of Glocester, are expired. Coventry contrary; and that the Estates do begin severally, and singulatim, as the Estates precedent shall end, and shall not expect untill the other Estates be determined; which see Justice Needham's Case, now reported by Coke, 5 part. 37 Eliz. and see Pollard's Case there cited. At another day it was objected by Snag, That the new Estate could not begin in any part untill all the former Estates be determined; for if this new Lease be made, reserving Rent; and one part thereof is now come in possession, then he should pay for that part all the Rent: But the Court was clear of Opinion, That the Lease in the ten Acres did begin presently, without having regard to the other Estates in demand for the intent of the Lessor was, That no mean time should be betwixt the expiration of the Lease for ten years, and the beginning of the new: As in the Case betwixt Wrotesley and Adams, 1 Eliz. Plo. Com. 198. A Lease is made to begin after the expiration of a former Lease for years; the first Lessee takes a new Lease of the Lessor, which was a Surrender of the former Lease; If the Lease, (scil.) the second Lease, shall now begin? was the question: or should expect untill the first Lease shall end by expiration, for the former Lease is ended, but not expired, i. by effluction of time: And it was holden, that the said second Lease should begin presently; for the intent of the Lessor was, that no mean time should be betwixt the end and beginning of the said Estates. And afterwards Judgment was given for the Plaintiff.

Pasc.

CXXXV. *Paſch.* 32 *Eliz.* In the King's-Bench.

NOTE, If a Record be removed out of the Common-Pleas into the King's-Bench by Writ of Error, and the Plaintiff ſhall not aſſign his Errors, then a Scire facias ſhall iſſue forth, quare executionem habere non debet: and upon ſummons, or two Nichels returned, the Plaintiff ſhall have Execution, yet the Plaintiff may aſſign his Errors. And to ſuch a Scire facias Exception was taken, becauſe the Writ was coram nobis apud Weſtm. where it ſhould be, ubicunque fuerimus in Anglia: and for that cauſe a Superſedeas was granted. It was alſo holden, That although a Writ of Error doth not lie here, upon a Judgment given in London; yet upon a Judgment given at Newgate, which is upon Commiſſion in their Seſſions, Error lieth here.

*Paſch.* 32 *Eliz.* In the King's-Bench.

CXXXVI. Bows *and* Vernon's *Caſe.*

DEBT upon an Obligation was brought by Bows againſt Vernon and Hennington, who pleaded the Statute of 23 H. 6. and ſhewed, that Vernon was in Execution, and that the Bond was made for his deliverance againſt the Statute: The Plaintiff replied, and ſaid, That at the time of the making of the ſaid Bond, the ſaid Vernon fuit ſui juris, and at large, abſque hoc, that he was in Priſon tempore confectionis ſcripti prædict. modo & forma, &c. Egerton, Solicitor, moved, that the Traverſe was not good; for if a man be in Priſon in Execution, and makes a promiſe to make a Bond, for which he is inlarged, and within an hour after he makes the Bond, the ſame is within the Statute: and therefore this iſſue is not well joined, but it ought to be abſque hoc, that it was pro deliberatione, &c. and of ſuch opinion was Fenner and Gawdy, Juſtices: See Dive and Manningham's Caſe, 4 E. 6. Plo. Com. 68, 69. acc.

*Hill.* 29 *Eliz.* In the Common-Pleas.

CXXXVII. Hunt *and* Sone's *Caſe.*

IN an Action upon the Caſe, the Plaintiff declared, That whereas the ſaid Plaintiff was ſeiſed in his Demeſn as of Fee, of certain Land, and ſhews the certainty of them; the Defendant Sone, in conſideration that the ſaid Plaintiff permitteret the ſaid Sone, occupare terras prædictas ab eodem die, (ſcil.) 20 Julii, 27 Eliz. uſque ad ſecundum diem Novembris, quod eſſet in Anno Dom. 1589. ſuper ſe aſſumpſit, quod ipſe idem W. Sone ad feſtum omnium Sanctorum proxime ſequen. 10 l. 2 s. 6 d. ac abinde annuatim durante termino dicto 20 l. & 5 s. at feſta Annunciationis beatæ Mariæ, ac omnium Sanctor. per æquales portiones ſolvend. eidem Hunt (the Plaintiff) bene & fideliter contentare vellet: Ac licet prædict. W. Hunt permiſit præfat. Sone occupare terras prædict. à dict. 20 die Julii, 27 Eliz. uſque ad ſecundum diem Novemb. 28 Eliz. Licetque poſt dictum 20 diem Julii, 27 Eliz. & ante prædict. diem 2 Novemb. Anno 20 Eliz. dictum feſtum omnium Sanctor Anno 27 Eliz. ſupradict. ac feſtum Annunciationis beatæ Mariæ Virginis, ac feſtum omnium Sanctor. 28 Eliz. præterierunt, præd. tamen W. Sone dict. 10 l. 2 s. 6 d. ad præd. feſtum omnium

Owen Rep. 42. 1 Cro. 118. 1 Roll. 30. 4 Len. 13.

omnium Sanctor. proxime sequent. post permissionem & assumptionem præd. ac aliud 10 l. 2 s. 6 d. ad festum Annunciationis 28 Eliz. ac alia 10 l. 2 s. 6 d. ad fest. omnium Sanct. Anno 28 Eliz. supradict. nondum solvit, &c. The Defendant pleaded, That the Plaintiff entred into parcel of the premisses ultimo Octob. 28 Eliz. & eadem occupare eidem W. Sone non permisit: upon which they were at issue, and it was found for the Plaintiff: And now it was moved in Arrest of Judgment, That the Plaintiff had not cause of Action before the whole Term be expired, for it is an intire Assumpsit, and cannot be by Action severed, and therefore it was said, That if I promise to pay you 20 l. viz. at such a Feast 5 l. and at such a Feast other 5 l. &c. there before the last day of payment no Action lieth, for the sum of 20 l. is one and entire: but if I promise to another at Easter next 10 l. and at Midsummer as much, &c. here are several Assumpsits, and upon default of payment of the first sum Actio oritur, without respecting the last payment: But at the last the Court was agreed, That Judgment, notwithstanding the said Exception, should be given for the Plaintiff: and said, That the Declaration was well enough, as well in respect of the Exception aforesaid, as also that this word [licet] is effectual enough for the setting down the permission.

*Trin.* 30 *Eliz.* In the King's-Bench.

## CXXXVIII. Roper's *Case.*

Stamf. 166, 167. Terms of the Law, 75, 76. Inst. 131.

ROper was robbed by Smith, and within a Week after the Robbery he preferred an Indictment against him, and within a Month after the Robbery he sued an Appeal against Smith, and prosecuted the same untill he was out-lawed; and thereupon Coke moved to have restitution of the Goods taken: And B. of the Crown-Office said, That the Fresh-suit was not enquired; for upon an Appeal one shall not have restitution without Fresh-suit. Coke, The Books are, That if the Defendant in an Appeal of Robbery be attainted by Verdict, the Fresh-suit shall be enquired of: but here he was attainted by Outlawry, and not by Verdict, and so the Fresh-suit cannot be enquired: and here the Indictment within a Week, and the Appeal within a Month after the Robbery, is a Fresh-suit. Wray, Fresh-suit in our Law is to persue the Felon from Town to Town, but the suing of an Appeal is not any Fresh-suit: See 21 E. 4. 16. Restitution granted upon an Outlawry in an Appeal of Robbery without Fresh-suit enquired: 1 H. 4. 5. if he confess the Felony: See 2 R. 3. 13.

*Trin.* 30 *Eliz.* In the Common-Pleas.

## CXXXIX. Piggot *and* Russel's *Case.*

1 Cro. 124. 1 Co. English his Case.

NOTE, it was agreed per Curiam in this Case, That if Tenant for life being of full age, and he in the Remainder within age levy a Fine, and afterwards the Infant reverseth the Fine as to him for the Inheritance, he shall not enter for forfeiture, because he joined in the Fine, and so assented to it.

*Trin.*

*Trin.* 29 *Eliz.* In the King's-Bench.

## CXL. *Sir* John Savage's *Caſe.*

IN Treſpaſs, the Defendant juſtified, becauſe Sir John Savage was ſeiſed of the Manor of D. within which Manor the cuſtome is, That if any man taketh to Wife, any cuſtomary Tenant of the ſaid Manor, and hath iſſue, and ſhall overlive his Wife, he ſhall be Tenant by the Curteſie; and pleaded farther, That he took to Wife one Ann, to whom, during the ſaid coverture, a cuſtomary Tenement of the ſaid Manor did deſcend, and that he had iſſue by the ſaid Ann, and that ſhe is dead, and ſo, &c. and it was adjudged, That the Husband by this cuſtome upon this matter, ſhould not be Tenant by the Curteſie; for Ann was not a cuſtomary Tenant of the ſaid Manor at the time of the marriage. Poſtea 208.

*Trin.* 29 *Eliz.* In the King's-Bench.

## CXLI. Stainsby *and* Hales's *Caſe.*

IN a ſecond Deliverance by Stainsby againſt Hales, Challenge was taken for the Hundred, and it was ſhewed and confeſſed, That the Hundred of Feverſham in Kent, was and is within the Lathe of Seray, and that there is not, nor ever had been any Court holden in the ſaid Hundred of Feverſham, but that all the Inhabitants within the ſaid Hundred have uſed to go to the Court of the Lathe of Seray: and it was holden by all the Juſtices, that in this Caſe Challenge ought to be taken for the Lathe, and not for the Hundred, for no Court had been holden in the Hundred; See 2 H. 4. 6. 11 H. 4. 2. A Juror was challenged for the Hundred, and the Triors ſaid, That the party challenged was not of the ſaid Hundred, where, &c. but they farther ſaid, that there were ſix Hundreds, all which came to one Court; and the ſame was holden a good anſwer to the challenge, and the party challenged was ſworn.

*Trin.* 27 *Eliz. Rot.* 1201. In the King's-Bench.

## CXLII. Sands *and* Hempſton's *Caſe.*

IN a Replevin, The Caſe was, That Henry, Earl of Weſtmerland, was ſeiſed of the Manor of Kennington in Fee, and granted a Rent-charge to William Cordel, afterwards Maſter of the Rolls, for life, and afterwards made a Feoffment thereof to Sir John Clifton, who granted a Copihold to Sands for life, according to the cuſtome of the ſaid Manor, the ſame being an ancient Copihold; Sir John died ſeiſed, the Rent is behind, Sir William Cordel died, Hempſton as Bailiff of Cary, Executor of Sir William Cordel, diſtrained for the arreages upon the poſſeſſion of Sands, and it was clearly holden by the whole Court, That the poſſeſſion of the ſaid Copiholder was not chargeable to diſtreſs upon this matter, for the Copiholder is not in by him who ought immediately to pay the Rent, but is alſo in by the cuſtome: Note by ſome, That the poſſeſſion of a Copiholder is not liable to the Executor, by the Statute of If it be ſo, that the Lord of the Manor be within the degree limited by the ſaid Statute. Dy. 270. 2 Brownl. 26. 3 Len. 59. 1 Leon. 4. 16. Poſtea 15. 2 Roll. 157.

*Trin.*

*Trin.* 29 *Eliz.* In the Common-Pleas.

## CXLIII. Hooper's *Case.*

HOoper of Salisbury was brought to the Bar, to wage his Law in an Action of Debt, and upon examination, the matter appeared to be, That the Defendant was indebted to the Plaintiff upon a ſimple Contract, and upon communication betwixt them, it was agreed, that one J. S. ſhould become bounden to the Plaintiff in an Obligation for the ſaid debt, to be paid at a day certain, which J. S. became bound accordingly, and the Defendant was alſo bound to the ſaid J. S. in a counter-bond for to ſave him harmleſs againſt the Plaintiff. And the Court was clear of opinion, that upon this matter, the Defendant could not ſafely wage his Law; for by this Obligation, made by a ſtranger to the Contract, the Contract upon which the Action is brought is not determined: And alſo here the Obligation was made after the Contract; But if J. S. had been bound, Ut ſupra, upon the Contract, it had been otherwiſe; and upon that reaſon, the Caſe of Pudſeys Caſe. one Pudſey was adjudged. Where, upon the Contract, a ſtranger to the Contract being preſent, made promiſe to enter into a Bond unto the party, &c. for the paiment of the money, agreed upon the Contract, and afterwards became bounden accordingly; in that Caſe the Contract was determined, becauſe the Obligation was purſuant to the Contract; and in the principal Caſe, the Court would not admit the Defendant to wage his Law, although he earneſtly deſired it.

*Trin.* 29 *Eliz.* In the Common-Pleas.

## CXLIV. Knevit *and* Taylor's *Case.*

KNevit enformed againſt Taylor in the Common-Pleas, upon the Statute of Uſury, and the parties were at iſſue, and the matter depended four Terms untried after iſſue was joined; and now the Defendant prayed, for his own expedition, that he might have Niſi Prius with Proviſo, as the courſe is in the Exchequer in ſuch caſe, to ſend Commiſſions into the Countrey where the Information is laid for the trial of the iſſue joined in the ſaid Court, and that at the ſuit of the Defendant. And it was much doubted, if the Court might grant ſuch Niſi Prius, becauſe the Queen is Quodammodo a party to the ſuit. And by Fleetwood, Serjeant, The common courſe is ſo; But where the Queen her ſelf is merely party, no ſuch Niſi Prius ſhall be granted: and he ſaid, That the Informer might be Nonſuit, although that the Queen be in ſuch manner party. Nelſon, Prothonotary, ſaid, That Poſtea 116. he never ſaw ſuch a Precedent, See F. N. B. 241.

*Trin.* 29 *Eliz.* In the King's-Bench.

## CXLV. Alford *and* Lea's *Case.*

1 Cro. 54. Poſt 181. ALford brought Debt upon a Bond againſt Lea, and the Caſe was, That the parties were bound the one to the other upon Condition, to ſtand to the Award of B. and C. who award, that the ſaid Lea, before ſuch a Feaſt, ſhall make a releaſe to Alford, but no place aſſigned where the releaſe ſhall be delivered to the Plaintiff. Lea, Before the ſaid Feaſt, ſealed a releaſe according to the award, and delivered the ſame to one Pine, to the uſe of the Plaintiff, who delivers it to one Maſon,

Maſon, one of the ſervants of Alford, the Plaintiff, who two or three dayes after, offers it to Alford, but he refuſed it, It was holden by Wray, That the award upon this matter was well performed, notwithſtanding the refuſal of Alford, See Tawe's Caſe, 1 Eliz. Dyer 167. A. enſeals, Quoddam ſcriptum Obligat. and delivers the ſame to one C. for to deliver it to the Obligee, who delivered it accordingly, as the Deed of A. who refuſeth to receive it; and after gets the Obligation, and recovers upon it.

*Trin.* 30 *Eliz.* In the King's Bench.

## CXLVI. Marſh *and* Rainsford's *Caſe.*

IN an Action upon the Caſe; the Caſe was, That a communication was had betwixt the parties, That the Plaintiff ſhould marry the daughter of the Defendant, in conſideration of which, the Defendant promiſed the Plaintiff to give him 200l. but they could not agree upon the days of payment of it, after which they ſtole away the Defendant's daughter, and ſecretly married her, without the Defendant's knowledge; yet afterwards the Defendant gave his conſent to it, and allowed of the ſaid marriage; and in conſideration of the ſaid marriage, promiſed to pay the Plaintiff 100l. Egerton, Solicitor General for the Defendant, That the Action upon this matter will not lie; for here the conſideration is precedent to the promiſe, whereas the conſideration in ſuch caſes, ought to be future and ſubſequent; and as the Caſe is here, the Plaintiff is out of the courſe of conſideration of marriage; for he hath ſtolen away and married his wife, without the knowledge or conſent of her father: See ſuch Caſe, 10 Eliz. Dyer 272. The ſervant of one A. is arreſted in London, and two friends of his Maſter bail him, and afterwards A. promiſeth to them, for their friendſhip, to ſave them harmleſs from damages and coſts, &c. It was holden that the Action doth not lie, for here is not any conſideration, for the bailment was of their own heads, and it is executed before the promiſe; But if the Maſter before the enlargement of his ſervant had requeſted the Plaintiff for to bail his ſervant, and he had ſo done, the Action would have lien. Wrey, Juſtice, Although the conſideration be precedent, yet if it were made at the inſtance of the other party, the Action would have lien. But here the natural affection of the father to his daughter, is ſufficient matter of conſideration. If one cometh to a Serjeant at Law to have his counſel, and the Serjeant doth adviſe him, and afterwards the Client in conſideration of ſuch counſel, promiſeth to pay him 20l. an Action lieth for it. And ſo Popham ſaid, it had been adjudged in the Exchequer: And it is the common Practice in this Court, in conſideration Quod querens deliberaſſet to the Defendant, &c. He promiſeth to pay him ſo much; and as it was late adjudged betwixt Style and Smith: If a Phyſician, who is my friend, hearing that my ſon is ſick, goeth to him in my abſence, and helps and recovers him, and I being informed thereof, promiſe him in conſideration, &c. ut ſupra, to give him 20l. an Action will lie for the money; and afterwards in the principal Caſe Judgment was given for the Plaintiff. 1 Leon. 102.

*Trin.* 30 *Eliz.* In the King's Bench.

## CXLVII. Williams *and* Linford's *Caſe.*

WIlliam's brought an Action upon the Caſe againſt Linford, for ſlanderous words ſpoken of the Plaintiff's land, viz. Williams is worth nothing, and do you think that the Manor of D. is his? It is but a compact 3 Len. 177.

pact between his brother Thomas and him; And farther declared, That at the time of ſpeaking of the words, he was in ſpeech with one J. S. to give to the ſaid J. S. the ſaid Manor of D. for his Manor of K. and that by reaſon of the ſaid ſlanderous words, the ſaid J. S. durſt not proceed in the ſaid intended exchange. It was objected, That upon this matter, an Action upon the Caſe doth not lie; For the ſcandalous words were not ſpoken to him who was to be the Purchaſor of the ſaid Manor, but to a ſtranger. For in the Caſe betwixt Smith and Johnſon, Johnſon was in ſpeech with another to ſell his lands to him; and Smith ſaid to him who was to purchaſe them, Will you buy Johnſon's land? Why, it is troubled with more charges and incumbrances than it is worth. Wray, Juſtice, There is no difference, whether words be ſpoken to the party, or unto a ſtranger, for in both caſes the Title of the Plaintiff is ſlandered, ſo as he cannot make ſale of his lands: Judgment was given for the Plaintiff.

1 Cro. 346, 787.

Smith and Johnſon's Caſe.

*Trin.* 30 *Eliz.* In the King's Bench.

## CXLVIII. Barefoot *and* Luter's *Caſe.*

THE Caſe was, A. B. and C. Joynt-tenants in Fee, C. granted his part unto D. and afterwards A. B. and D. Leaſed for years, rendring Rent, and afterwards A. died, and they brought an Action of Debt for the Rent reſerved, and declared generally, and upon the Evidence, the ſpecial matter appeared, that two parts of the Rent did belong to B. and but the third part to D. And the opinion of the Court was; That the Declaration ought to have been ſpecial upon the whole matter; For Prima facie, it was conceived that each of the Plaintiffs ought to have had the moiety of the Rent, and that is a ſuppoſal of the Declaration: But now upon the Evidence, it appeareth to the contrary: So as the Defendant nil debet, in that form; Another matter was, The Plaintiff declared of Rent of a whole year, ended at the Feaſt of St. Michael laſt paſt, whereas the Rent was not due at Michaelmas, as the Plaintiff had declared, but the thirtieth day after.

*Trin.* 32 *Eliz.* In the King's Bench.

## CXLIX. Brown *and* Ordinacre's *Caſe.*

HEnry Brown, and Joice his wife, Executors of Thomas Brown, brought an Action upon the Caſe againſt Van Ordinacre, Alien, and declared, That where A. and B. were indebted to the Teſtator, The Defendant, in conſideration that the Teſtator reſpectuaret the ſaid A. and B. pro ſolutione debiti prædict. per ſpacium unius ſeptimanæ tunc proxime ſequen. to pay the Debt to the ſaid Plaintiffs, modo ſequent. viz. one moyety within one week after, and the other moiety at the end of the ſaid week; and farther declared, That the Teſtator did forbear by the ſpace of a week; and after Imparlance, Joice was ſummoned, and severed. The Defendant pleaded, That he did not promiſe, modo & forma prout prædict. Brown allegavit, and that it was alledged by both Executors. And by a Jury, De medietate Linguæ, it was found for the Plaintiff. It was objected by Coke, That here is not any iſſue, prout Brown querens allegavit, where in truth, it was alledged by both the Executors, before ſeverance, and not by Brown onely. Alſo here is not any ſufficient conſideration alledged; for the Plaintiff hath declared, That he hath forborn by a week, without ſaying, next following, as the conſideration

ſideration is laid in the Declaration; But that was not allowed, for ſo it ſhall be intended. It was alſo objected, That the Declaration is contrary to it ſelf; for it ſhewed, That in conſideration that the Teſtator ſhould forbear for a week, he promiſed to pay him within a week; but that exception was not allowed: For the week, in the Aſſumpſit, ſhall be conſtrued, the week after the week in the conſideration. Another exception was againſt the trial; for the Defendant being an Alien, The Venire facias was to ſummon twelve perſons, Quorum quilibet eorum habeat 4 l. in lands of annual Rent, and that cannot be; for Aliens cannot have lands, not being made Denizens: By the Common Law before the Statute of 27 E. 3. An alien by the Grant of the King, might have an Action depending betwixt him and a Denizen, per medietatem Linguæ, which ſee 22 E. 3. 14. and afterwards to make the ſame a general Law, the Statute of 27 E. 3. was made; but the ſame doth not extend to caſes where the King was party, which defect was ſupplyed by the Statute of 28 E. 3. cap. 13. Afterward came the Stat. of 2 H. 5. by which it is enacted, That where the debt or damages amount to 10 marks every Juror returned for the trial, ſhould be able to expend lands of the value of 40 s. which was miſchievous as to aliens; and for the remedy of that, The Statute of 8 H. 6. cap. ult. was made, which took away the effect thereof, as unto aliens; Then came the Statute of 27 Eliz. which enacted, That every Juror, &c. ſhould expend 4 l. lands, but that is where 40 s. was required onely, and doth not extend to our Caſe; and therefore the Venire facias in our Caſe, was not well awarded, To which it was ſaid by the Clarks, That after the Stat. of 27 Eliz. It had always ſo been, to make the Venire facias generally according to the Statute; but that is not a thing material, and the Sheriff needs not regard that: Wherefore it was holden; That the Venire facias in the principal Caſe was well awarded.

*Paſc.* 32 *Eliz.* In the King's Bench.

## CL. Mingey *and* Earl's *Caſe*.

IN Debt upon an Obligation, The Defendant pleaded, That the Obligation was with condition, That whereas the Defendant had ſold to the Plaintiff certain wood, growing upon certain lands, called S. in the County of Suſſex. If the Plaintiff might quietly take and enjoy the ſaid woods; and if the ground whereupon it groweth be four miles from the Town of Rye, that then, &c. And for plea he ſaid, That the Plaintiff had quietly taken and enjoyed the ſaid wood, and that the ſaid land, by the next high and uſual way for carriages, is 4000 paces from the Town of Rye, reckoning to every pace five foot; upon which the Plaintiff did demur in Law. Gawdy, Juſtice, For the computation of a mile, in common underſtanding, it is 1000 paces, and if it ſhall be counted by the common way, is the doubt; but the meaning of the Parties was, That the Plaintiff by felling of that wood, ſhould not encur the damage of the Statute of 23 Eliz. cap. 4. And the Statute doth not reſpect the way of carriage, but that altogether, and to all intents, it be the diſtance of four miles betwixt the place where, &c. and the ſaid Town of Rye; and here it is not material which is the common and uſual way to Rye for carriages; but the nearneſs of the place where, &c. Quomodocunque, is the matter; and therefore the Defendant ought to have pleaded, That the place where, &c. is every way diſtant four miles from Rye; and as to that, that he hath anſwered four miles, with 4000 paces, the ſame is well enough; for although he doth not anſwer the direct the words; yet if he doth

1 Cro. 212, 267.

anſwer in effect, it is well enough; for 1000 paces, and a mile, are all one in ſubſtance: Wray, The diſtance ſhall be accounted the neareſt way, not as a Bird may fly.

*Trin.* 31 *Eliz.* In the King's- Bench.

## CLII. Wellock *and* Hammon's *Caſe.*

3 Co. 20. 1 Cro. 204, 205. This Caſe is reported by Sir Edw. Coke, in his 3 Reports: See the principal caſe there. Here is a Limitation, and not a Condition; for if it ſhould be a Condition, it ſhould deſcend to the heir at the Common Law, which is the Deviſee, and ſo ſhall be extinct in his perſon, and then the reſtraint is of no effect, for there ſhall be then no means to compell the heir who hath the Land, to pay the Legacies, nor have the Legatories any remedy to compell the ſon to pay the Legacies, which ſhall not have effect, if it be not taken by way of Limitation: and to that intent, Scholaſtica's Caſe was cited, 15 Eliz. Dyer, 317. And this word, paying, in a Deviſe, ſhall never be conſtrued to be a Condition. And it was holden by the Juſtices, That where a man deviſeth lands to his younger ſon, paying ſuch a ſum unto ſuch, the Deviſee hath a Fee-ſimple; and if he do not pay the monies accordingly, his Eſtate ſhall determine, by the ſame Limitation, and ſhall go to the heir without any other limitation, and the quantity of the monies, be it great or ſmall, is not material: And they were of opinion alſo, that here the monies were not payable, but upon requeſt: 2 Cro. 56, 57. 1 Roll 439. Coke, If a man be bound to perform Covenants, and one Covenant is to pay Legacies, there he needs not pay them without a demand; But where one is expreſly bounden to pay ſuch a Legacy, there he muſt pay it at his peril. And he ſaid, That the Caſe, 28 H. 8. Dyer 33. is not Law; for there it is holden by Fitz-herbert and Baldwin, That where land was deviſed unto the Prior, and Convent of S. Barthol. Ita quod reddant annuatim Decano & Capitulo Sancti Pauli. 5 l. and they fail of payment of it, that their Eſtate ſhall ceaſe, and the Dean and Chapter, &c. ſhall have, &c. ſuch conditions void. And that upon one Fee-ſimple, another Fee-ſimple cannot be limited; For by Coke, Common experience is otherwiſe, That upon a Fee-ſimple determinable, another Fee-ſimple may be limited; which Gawdy, Juſtice granted: And as to the principal Caſe, Judgment was given, with the limitation.

*Paſc.* 28 *Eliz. Rot.* 485. In the King's Bench.

## CLIII. Parker *and* Harrold's *Caſe.*

3 Len. 142. In Debt upon an Obligation, The Condition was, That whereas the Plaintiff and Defendant be now jointly ſeiſed of the Office of the Regiſter of the Court of Admiralty, If the Defendant ſhall permit the Plaintiff to uſe the ſaid Office, and take the profits of it wholly to his own uſe during his life, without let or interruption done by him, that then, &c. The Defendant Pleaded, That the cuſtome of the Realm of England is, That the Lord Admiral for the time being, might grant the ſaid Office, and that ſuch grant ſhould be good antea. 103. but for the life of the Grantor; and ſhewed further, That the Lord Clinton, Lord Admiral, granted the ſaid Office unto the Plaintiff and the Defendant, and died; and that the Lord Howard was appointed Lord Admiral, and that he 27 Eliz. granted the ſaid Office to one Wade, who ouſted and interrupted him, before which time, the Defendant did ſuffer the Plaintiff to enjoy the ſaid Office, and to take the profits of it, upon which

which the Plaintiff did demur in Law, Coke argued for the Plaintiff, That the Plea of the Defendant is not good; for he hath not entitled the Lord Admiral to grant the Office; for he hath said, That the custome of the Realm of England is, and that cannot be good, for it cannot be tried; for a Alsne cannot be from the Realm of England: Also if it lie through all the Realm, then the same is Common Law, and not custome, which see, Br. Custome 59. and see 4 & 5 Ph. & Ma. 152, 153. an express Case of the same Office, and there he prescribed, Per consuetudinem in Curia, &c. and also that such grant is good but during the life of the Admiral who granteth it: Also he doth not answer to any time after the grant of the Admiral Howard; for if we were lawfully put out by Wade, yet the Defendant against his Bond, shall not put us out, or interrupt us: As 5 E. 4. 115. In a Quare Impedit against an Abbat, and the Incumbent, who make default upon the distress, upon which a Writ was awarded to the Bishop for the Plaintiff, upon which the Bishop returned, That the Incumbent had resigned, of which he hath given notice to the Prior, and lapse incurred; and the Bishop collates the former Incumbent, and then this Writ came to him; Now, although the Incumbent be in by Title, yet he is bound by the Judgment: So here, although the Defendant hath another Title, and the former Title of the Plaintiff be determined, yet against his own Bond and Deed, he shall not put out the Plaintiff, &c. And the Court was clear of opinion, That Judgment should be given for the Plaintiff; but afterwards the Cause was compounded by order of the Lord Chancellour.

*Trin.* 32 *Eliz.* In the King's-Bench.

## CLIII. Bedel's *Case.*

THE Case was, That A. leased to B. certain Lands for 40 l. per ann. and a stranger covenanted with A. that B. should pay unto him the 40 l. for the Farm and occupation of the said Lands. A. brought an Action of Covenant; the Defendant pleaded, That before the day of payment the Plaintiff ousted B. of his Farm: It was moved by Godfrey, that it was no Plea, because this is a collateral sum, and not for Rent issuing out of Land: Also the Defendant is a stranger to the Contract for the Farm: But the opinion of the Court was to the contrary; for the Defendant hath covenanted, that the Lessee shall pay for the said Farm and occupation 40 l. so it is as a conditional Covenant, and here is Quid pro Quo; and here the consideration upon which the Covenant is conceived, (scil.) the Farm, and the occupation of it, is taken away by the act of the Plaintiff himself. 3 Len. 159.

*Pasch.* 30 *Eliz.* In the King's-Bench.

## CLIV. Heal's *Case.*

HEal, a Bencher of the Inner Temple, being at the Bar; Wiat, another Apprentice at Law, informed the Court against the said Heal, and shewed, That where his Client had obtained a Judgment in the King's-Bench: The said Heal, being of Council with the other part, did advise his Client to bring the party, who had obtained the Judgment, into the Chancery, and he procured an Order against him, by which he was cast into Prison: Which matter Heal could not excuse, but submitted himself to the Court, saying, That he had seen a precedent which induced him so to doe: and that was the Case of one Co. 3 Inst. 12. 123, 124. 4 Inst. 86, 91.

Princes Caſe. Prince, where a Judgment given in this Court was drawn into queſtion and examined in the Chancery: But the Juſtices ſaid, That the ſame was an ill precedent, and againſt the Statute of 4 H. 4. which is, That no Judgment be undone but by Error or Attaint.

*Paſch.* 30 *Eliz.* In the King's-Bench.

## CLV. Gray *and* Conſtable's *Caſe.*

SIR Thomas Gray covenanted with the Lady Conſtable, That where he is poſſeſſed of a Leaſe for twenty one years of certain Lands, That he will aſſure, convey and aſſign the ſaid Leaſe to one Nevil, excepting the two laſt years of the ſaid twenty one years: and he ſaid Sir Tho. Gray was bound in a Bond to perform the Covenants of the ſaid Indenture; upon which Indenture the Lady brought Debt againſt the ſaid Sir Tho. Gray, who pleaded the Conditions, and the performance of them: The Plaintiff replicando ſaid, That the Defendant non aſſuravit, conveiavit, & tranſpoſuit, Anglice, ſet over, the ſaid Leaſe; upon which they were at iſſue: And at the day of the Niſi Prius, it was moved by Cooper and Beaumont, That the Iſſue was miſjoined; for the Defendant pleads (as the Covenant it ſelf is) That he had aſſured, conveyed, and aſſigned the Leaſe, and ſo pleaded the performance of other Covenants, &c. The Plaintiff aſſigned the breach in this, Quod non aſſuravit, conveiavit, & tranſpoſuit, Anglice, ſet over; which word [tranſpoſuit] is not in the Covenant, nor in the pleading of the performance thereof: and the Engliſh word [ſet over] although it ſounds the ſame with aſſigning, doth not help the matter; and if the Latin word doth not agree with the matter, non refert of the Engliſh word, although in the Plea there be this word Anglice [ſet over.] Note, the Covenant was (ut ſupra) The Plaintiff aſſigned the breach, Quod non aſſuravit, conveiavit, & tranſpoſuit, Anglice [ſet over,] &c. And the Defendant pleaded, Quod aſſuravit, conveiavit, & tranſpoſuit, Anglice, ſet over, &c. And the Court was clear of opinion, That the Iſſue for that cauſe was not well joined: And afterwards, by the aſſent of the parties it was amended.

*Paſch.* 30 *Eliz.* In the King's-Bench.

## CLVI. Doghead's *Caſe.*

Hutt. 35. Hob. 250. Antea 110. 1 Cro. 177. And. 116.

AN Information was upon the Statute of 27 Eliz. cap. 4. by the party grieved; which Statute gives unto the King one moyety of the value, and the other moyety to the party grieved: The Plaintiff was nonſuit; It was holden by the Court, that he ſhall not pay coſts and damages by the Statute of 18 Eliz. for the Statute (as the Title of the ſame doth imply) is to redreſs Diſorders in common Informers; and ſo is the Preamble: and the words alſo of the clauſe of coſts and damages are [Every ſuch Informer] and ſo by Ive, Secondary of the Crown-Office, An Action given to the party grieved is not a popular Action; and the Statute of 18 Eliz. extends onely to popular Actions.

*Paſch.*

*Paſch.* 30 *Eliz.* In the King's-Bench.

## CLVII. Cony *and* Chomley's *Caſe.*

IN an Ejectione Firmæ, after Verdict in Arreſt of Judgment, it was moved, That the Plaintiff had declared in Ejectione Firmæ, Quod cum Robertus Diggon per Indenturam ſuam gerent. dat. 20 Maii, dimiſit, &c. where he ought to have ſaid, iiſdem die & anno: For although the Indenture bear date (ut ſupra) yet it may be that it was delivered at another day, and then it doth begin to be a Demiſe. And if in an Action upon the Caſe upon Aſſumpſit to pay money upon requeſt, although it be found for the Plaintiff, yet if no day be put in the Declaration when the requeſt was made, but onely [licet ſæpius requiſitus] in caſe where a requeſt ought to be made, there the Plaintiff ſhall not have Judgment; as it hath been oftentimes adjudged, Quod omnes Juſticiarii conceſſerunt: But yet afterwards, notwithſtanding the Objection aforeſaid, Judgment was given for the Plaintiff. 1 Cro. 773. 890.

*Mich.* 29 and 30 *Eliz.* In the Common-Pleas.

## CLVIII. Marſh *and* Jones's *Caſe.*

IN a Replevin, the Caſe upon the Evidence was, That before the Statute of Quia Emptores terrarum, a man made a Feoffment in Fee, to hold of him by the ſervice, ſolvendi poſt quamlibet vacationem ſive alienationem, the value of the annual profits of the Lands: And it was holden by the Court, That the value ſhall be intended ſuch a value, as was the value at the time of the Feoffment made, and not as it is improved by ſucceſſion of time. 3 Len. 114.

*Mich.* 29 and 30 *Eliz.* In the King's-Bench.

## CLIX. Willoughby's *Caſe.*

WIlliam Willoughby and two other were indicted, That whereas the Parſon of the Church of D. and all his predeceſſours have uſed to have Common in ſuch a place, the ſaid Willoughby, &c. vi & armis, &c. had incloſed it, and the Incloſure was upon their own Lands: It was moved, That upon this matter they ought not to be indicted, but the party grieved is put to his Action; as where a Preſentment is made of a Diſſeiſin: See 27 Aſſ. 20. And it was the Caſe of one Morden, 29 Eliz. upon the ſtopping of a Way upon his own Land: And it was ſaid, That if it ſhould be upon the Lands of another, it were not material: for it is but a hindrance from the taking of Common, which cannot be vi & armis. Alſo it was ſaid, That the Indictment is recorded and certified, as found before the Juſtices of Aſſiſe and Gaol-delivery, and they cannot take ſuch Preſentments: And although the ſaid Juſtices of Aſſiſe and Gaol-delivery were in rei veritate alſo Juſtices of the Peace, yet the Indictment being recorded, and certified to be taken before them, in quality of Juſtices of the Peace, will not help it: for the Court ſhall not reſpect any other authority, but that which appeareth upon Record; and therefore for the cauſes aforeſaid they were diſcharged by the Court. 1 Cro. 3 Len. 216. Morden's Caſe. 1 Cro. Maddox Caſe.

*Hill.*

*Hill.* 30 *Eliz.* In the King's-Bench.

## CLX. Collet *and* Robſton's *Caſe. Error.*

3 Len. 149. COllet and Andrews recovered in a Writ of Account againſt Robſton: Hil. 29 Eliz. Rot. 1. and now Robſton brought a Writ of Error, and aſſigned for Error, That whereas the ſaid Writ of Account was brought againſt the ſaid Defendant as Receiver of Monies, for to render Account, quando ad hoc requiſitus fuerit, the ſaid Writ ought to have been more ſpecial: But the opinion of the Court was, That the Writ in his generalty was holden good: And ſo it was adjudged in the Caſe of one Gomerſal, (ſcil.) quod reddat ei rationabilem computum ſuum de tempore, quo fuit Receptor Denariorum ipſius A. Another Error was aſſigned, That the Jury had aſſeſſed damages which ought not to be given in an Action upon Account: which ſee 2 R. 2. Acco. 45. and 2 H. 7. 13. But ſee the Book of Entries, fo. 22. In a Writ of Account againſt one, as Receivor to Account render, damages were given: 1 Leon. 302. For if my Bailiff, by imploying of my Moneys, whereof he was the Receivor, might have procured to me profit and gain, but he neglects it, he ſhall be chargeable to me in right, and ſhall anſwer for it. And here in our caſe, damages ſhall be given: and afterwards, notwithſtanding all objections made to the contrary, the Judgment given before was affirmed.

*Hill.* 30 *Eliz.* In the King's-Bench.

## CLXI. Yates's *Caſe.*

3 Len. 231. A Writ of Error was brought by Yates and others upon a Judgment given in a Writ of Partition; and it was aſſigned for Error, that the Writ of Partition was not ſufficient; for it is there ſet forth, That the Plaintiffs inſimul & pro indiviſo tenent cum defendente, &c. and do not ſhew, of what Eſtate, or whoſe inheritance: See F. N. B. 61. 5. and 62. a. inſimul & pro indiviſo tenent de hæreditate quæ fuit A. matris 1 Cro. 759, 760. of the Plaintiff and the Defendant. And yet ſee F. N. B. 62. A. A Writ of Partition betwixt ſtrange perſons, without naming hæreditate in the Writ: And ſee alſo that a Partition of Lands in London, without ſhewing of what Eſtate: See Regiſter 76. 6 Eliz. in a Partition by Courtney againſt Polewheel, no Eſtate ſhewed in the Writ: ſo betwixt Finch and Firrel, and betwixt Fry and Drake, 14 Eliz. Devon. 26 Eliz. betwixt the Lord Cheney and Bell: and Mich. 4 and 5 Ph. and Ma. Rot. 208. It was holden, That it is not neceſſary in ſuch a Writ to ſhew the Eſtate: and ſuch alſo was the opinion of the Court in the principal Caſe: but Tenants in common ought to ſhew it in the Count: And the Judgment given was affirmed.

Courtney and Polewheel's Caſe. Finch and Firrel's Caſe. L. Cheney and Bell's Caſe.

*Mich.* 29 and 30 *Eliz.* In the King's-Bench.

## CLXII. Phillips *and* Stone's *Caſe.*

IN Debt upon an Obligation, the Defendant pleaded the Statute of 32 H. 6. upon which this ſpecial matter was found, That one J. S. had heretofore recovered againſt him 100 l. in an Action of Debt, and upon the Capias ad ſatisfaciend. he was taken and committed to the Plaintiff, who was Gaoler, &c. to the Sheriff, and ſo being in Execution

cution he escaped and afterwards he was re-taken by the Plaintiff, and kept in prison; and so being in prison, made the Bond upon which the Action is brought: It was said by the Court, That if a Prisoner being in Execution, escapes with the permission of the Gaoler, the Execution is utterly gone and extinguished, and the Plaintiff, at whose Suit he was taken in Execution, shall never resort to him who escapes, but shall hold himself to the Gaoler for his remedy: but if such a Prisoner escapes of his own wrong without the privity or consent of the Gaoler, the Gaoler may well take him again for his indemnity, untill the Plaintiff hath determined his Election, whether he will have his remedy against the Gaoler, or that he will maintain his Execution: 13 H. 7. 1, and 2. But as unto the Statute of 23 H. 6. the Court was of Opinion, That posito that the party who escapes cannot be taken again; yet being taken, the Bond which is taken colore Officii, is within the said Statute, because the party was re-taken colore Executionis, and so the Bond was void.

*Mich.* 29 & 30 *Eliz.* In the King's Bench.

## CLXIII. Gering's *Case*.

IN Debt upon an Obligation, against one as Executor; the Case was, That the Testator of A. by his Will, appointed certain lands, and named which should be sold by his Executor, and the monies thereof coming, to be distributed betwixt his daughters, when they have accomplished the age of one and twenty years. The lands are sold, and the monies thereof being in the hands of the Executor, untill the full age of the daughters shall be Assets to pay the debts of the Testator, was the question; and it was the opinion of the whole Court, that the said monies should not be Assets; for they said, that that money is limited to a special use: Quære of this Case; For I have heard, that it was afterwards resolved in another Case, that the monies in the like Case remaining in their hands should be Assets. 1 Len. 87.

*Mich.* 29 & 30 *Eliz.* In the Common Pleas.

## CLXIV. Davies *and* Percie's *Case*.

BEtween Margaret Davies and one Perce, the Case was, That one Anth. Perce, upon speech of a marriage to be had betwixt the said Anthony, and the mother of Margaret, covenanted by Indenture with certain friends of the mother, to pay to all the daughters of the mother 20 l. a piece at their several ages of four and twenty years, and to perform the Covenant, was bound to the said friends in an Obligation. Anthony Perce made his Will, and willed, that his Executors should pay to each of the daughters 20 l. at their several ages of four and twenty years, in discharge of the said Covenant, and died; And the said Margaret sued the Executors in the Spiritual Court for the 20 l. bequeathed to her, and upon this matter, the Executors prayed a Prohibition: And by the Lord Anderson, a Prohibition will lie; for here is no Legacy, but the Will refers to the Covenant, and is in full charge of the Covenant: As if A. be indebted to B. in 20 l. And if A. by his Will willeth that his Executors shall pay to the said B. 20 l. in discharge of the said debt, the same is not any Legacy, but a Declaration that the intent of A. is, that the debt shall be paid. Periam, Justice, was of the same opinion as the Lord Anderson; and Anderson said, If a Legacy be bequeathed to me, and the Executor covenants to pay me 2 Roll 284. Goldb. 58.

me the ſaid Legacy, and afterwards J. ſueth the Executor in the Spiritual Court, he ſhall have a Prohibition; Quod cæteri Juſticiarii negaverunt, See F. N. B. 44 Br. If the Teſtator by his Will charge his Executors to pay his debts and his creditors, they do not pay them, and the creditors ſue them in the Spiritual Court, they ſhall not have a Prohibition, which Anderſon Vehementer negavit; and afterwards the Juſtices looked and adviſed upon the Indenture, and found that the indenture and Obligation were made to the friends of the mother of the daughters, and not to the daughters themſelves, to whom the Legacies were give and bequeathed; and therefore were of opinion, that a Prohibition did not lie.

Vide 6. H. 3. Prohib. 17.

*Hill.* 30 *Eliz.* In the Common Pleas. *Rot.* 336.

## CLXV. Thorp *and* Tomſon's *Caſe.*

IN Ejectione firmæ, It was found by ſpecial Verdict, That one Thimblethorp was ſeiſed of the lands where, &c. and by Contract, ſold the ſame to Thorp, but no aſſurance was yet made; and afterwards, Thorp before any aſſurance made, ſold likewiſe the ſaid lands to Tomſon, and afterwards, Thimblethorp made aſſurance thereof to Tomſon, and afterwards Tomſon being ſeiſed, deviſed the Lands to his younger ſon, by theſe words: I bequeath to R. my ſon, all the lands which I purchaſed of Thorp, whereas, in ſpeaking the truth according to Law, he purchaſed them by immediate aſſurance of Thimblethorp, although he did contract with Thorp for the ſame; And the opinion of the whole Court was without argument either at Bar, or at the Bench; That the Deviſe was good; for in the repute of the people, they reputed of Thorp, for Tomſon paid the monies for the ſame to Thorp, and the Court commanded Judgment to be entred accordingly: And afterwards Exception was taken to the Verdict, becauſe it is not found by what ſervice the land deviſed was holden, Socage, or Knight-ſervice; nor that the Deviſor is dead; and theſe were holden to be material Exceptions, and for that cauſe, the Judgment was ſtayed, and afterwards the Verdict was rejected, and a Venire facias de novo awarded.

Dyer 376.

*Hill.* 30 *Eliz.* In the Common Pleas.

## CLXVI. Grove *and* Sparre's *Caſe.*

AN Action of Treſpaſs was brought by Grove againſt Sparre, Proceſs continued untill Sparre was outlawed; and now it was moved unto the Court, to avoid the Outlawry, That the original Writ, and all the Judicial Proceſs thereupon are directed Vice-Com. Wigorn. and in the Filazar's Roll, in the Margent is written, Hereford, and in the body of the ſaid Roll is written, Et prædictus Grove obtulit ſe quarto die poſt, Et Vicecomes modo mandat. quod prædictus Spar non eſt inventus, &c. Ideo præceptum eſt Vicecom. &c. and at the Capias returned, it is entred in the Roll as before, Hereford: whereas the Capias is directed Vicecom. Wigorn. as of right it ought to be: and the Roll was peruſed by the Court, and it was, ut ſupra, and that without any ſuſpicion of Raſure; for which the Court gave day to the Queens Serjeants to adviſe themſelves to maintain the Outlawry; and the Defendants Council prayed, That a Recordatur be made in what Eſtate the Roll now is, for doubt of amendment by way of Raſure, or otherwiſe; which was granted by the Court.

Mich.

*Mich.* 33 *Eliz.* In the Exchequer.

## CLXVII. Ruſhton's *Caſe.*

RUſhton was indebted to the Queen in 200 marks, upon which iſſued an Extent againſt him out of the Exchequer to levy the ſaid ſum to the Sheriff of Suffolk; and it was found by Inquiſition, That Ruſhton 22 Junii, 22 Eliz. was poſſeſſed of a Leaſe for the term quorundam annorum adhuc venturorum; and the debt of the Queen did begin 12 Febr. 17 Eliz. Exception was taken to this Office, becauſe that the term is not certainly found but generally quorundam annorum; and it was ſaid by Coke, That the Office was good, notwithſtanding that Exception, for the Queen is a ſtranger to the Leaſe, and therefore ought not to be forced to find the preciſe certainty; which ſee in Partridge's Caſe in Plowd. The Defendant had made a Leaſe Pro termino quorundam annorum contra formam ſtatuti: Alſo Ruſhton came not to the Leaſe by Contract, but by compulſary means, as by Execution, &c. And here we are not in the Caſe of pleading, but of an Office, where ſuch preciſe form is not requiſite: As if it be found by Office, that J. S. was ſeiſed in tail, without ſhewing of whole gift the ſame was, it is good; ſo an Indictment, De morte cujuſdam hominis ignoti, the ſame is good, but ſuch Endictment taken before the Coronor, is not good: And that a Leaſe for years may be extended, ſee 21 Aſſ. 6. If a man be indebted to the Queen, being a Leſſee for years, and afterwards before any Extent comes, ſells his term, the ſame cannot be extended after. And here it appears, That this Leaſe was to begin at a day to come, and that the Leſſee did enter before the day, by which he was a Diſſeiſor; and ſo he ſaid he had loſt his term. Tenant for the life of another is diſſeiſed, and dieth, he remains a Diſſeiſor, and the occupancy doth not qualifie ſuch diſſeiſin: And afterwards the Inquiſition for the incertainty aforeſaid was holden void, and a new Commiſſion was awarded.

See this Caſe vouched in 7 C. 4 part, in Palmer's Caſe. 3 Len. 204.

*Mich.* 29 *Eliz.* In the Common Pleas.

## CLXVIII. Holland *and* Boin's *Caſe.*

IN a Replevin by Thomas Holland againſt William Boin's, who made Conuſans, as Bailey to Thomas, Lord Howard, and ſhewed, that the Prioreſs of the late diſſolved Priory of Hollywell was ſeiſed of the Manor of Priors in the County of Hertford, and granted the ſame by words of Dedi & Conceſſi pro certa pecuniæ ſumma, to Thomas Audley, Chancellor of England, and his Heirs, who entred and died ſeiſed, and that the ſaid Manor, inter alia, deſcended to Mary, daughter and Heir of the ſaid Thomas Audley, who entred, and alſo died ſeiſed, by force whereof the ſaid Manor deſcended to the ſaid Thomas Lord Howard, &c. and ſhewed, that the ſaid conveyance, by the prioreſs to Audley bore date 4 Novemb. 29 H. 8. and then enrolled in the Chancery. The Plaintiff in Bar of the Avowry, ſhewed, that after the making and enrolling of the ſaid Conveyance, the ſaid Prioreſs Leaſed the ſaid land to Sir H. Parker for 99 years, and conveyed the ſaid land to him, and ſhewed farther, That the ſaid Conveyance ſpecified in the Conuſans was primo deliberatum, 4 Nov. 31. H. 8. Abſque hoc, that the ſaid Prioreſs, the ſaid 4 Novembris, 29 H. 8. dedit & conceſſit, the ſaid Manor to the ſaid Audley, upon which it was demurred in Law; and the Court was clear of opinion, That the averment of primo deliberatum,

3 Len. 175, 1 Len. 183. Ow. 138.

against a Deed enrolled ought not to be reverſed, for by the ſame reaſon it may be averred never delivered, and ſo upon the matter, Non eſt factum: And it was farther objected, That bargain and ſale by a Corporation is not good; for a Corporation cannot be ſeiſed to another uſe, and the nature of ſuch Conveyance is to take effect by way of uſe in the Bargainee, and after the Statute to draw the poſſeſſion to the uſe; But the Court utterly rejected that Exception was dangerous, for ſuch was the Conveyance of the greater part of the poſſeſſions of Monaſteries: And by Shuttleworth Serjeant, Although ſuch a Corporation cannot take an Eſtate to the uſe of another, yet they may charge their poſſeſſions with an uſe to another.

Note, *Paſch.* 30 *Eliz.* it was adjudged for the Plaintiff in the Replevin; (*ſcil.*) the Conveyance of the Prioreſs was not well pleaded; for it ought to be pleed as a Bargain and Sale, and not as a grant: and Judgment was given accordingly.

*Mich.* 28 & 29 *Eliz.* In the King's Bench.

## CLXIX. Venable's *and Serjeant* Harris's *Caſe.*

Quæries. Hughs R. 13. 3 Len. 185. 4 Len. 112.

THE Caſe was, a Leaſe was made to A. and B. for their lives, the Remainder to Thomas Venables in tail, who 3 Eliz. was attainted of Felony; 23 Eliz. was a general pardon: Thomas Venables 24 Eliz. levied a Fine, and ſuffered a common Recovery to the uſe of Harris Serjeant. An Office is found, Harris traverſeth the Office, and upon that there is a demurrer. Leke argued, That traverſe doth not lie in this Caſe: 4 H. 7. 7. where the King is entitled by double matter of Record, the party ſhall not be admitted to traverſe, nor to his Monſtrans de Droit, but is put to his Petition, which ſee, 3 E. 4. 23. in the Caſe of the Earl of Northumberland, where the Tenant of the King is attainted of Treaſon, and the ſame found by Office: See alſo 11 H. 4. in the Caſe of the Duke of Suffolk, and that is not helped by the Statute of 2 E. 6. cap. 8. For the words are untruly found by Office, but here the Office is true. By this Attainder, Thomas Venables is utterly diſabled to do any Act; for by Bracton, a perſon attaint, ſhall forfeit Patriam, Regnum & Hæreditatem ſuam: 11 H. 4. one was attainted of Felony, and before Office found, the King granted over his Lands: Alſo he is not helped by the general pardon; for before the general pardon, he had a ſpecial pardon, ſo as the general pardon non operatur. But the Juſtices ſaid, The forfeiture did remain untill the general pardon. Harris, contrary; And he put the caſe of Sir James Ormond, 4 H. 7. 7. where the King is entitled by matter of Record, and the ſubject confeſſeth the King's title, and avoids it by matter of as high nature as that is for the King, Traverſe in that caſe lieth: and if the King be entitled by double matter of Record, if the party doth avoid one of the ſaid Records by another Record, he ſhall be admitted to his traverſe; and ſo here we have the pardon, which is a Record, and that ſhall avoid the Record of the King: See 3 E. 4. 24. in the Earl of Northumberland's Caſe; and here the pardon hath purged the forfeiture, in reſpect of the offence: and he ſaid, Tenant in tail being attainted of Felony, ſhall not loſe his lands, but the profits onely, for he hath his Eſtate by the Will of the Donor, and there is a confidence repoſed in him: as in Walſingham's Caſe, he cannot grant his Eſtate over: and ſee Wrothe's Caſe; An annuity granted, pro Conſilio impendendo cannot be granted over or forfeited, for there is confidence: And ſee Empſon's Caſe, and Dyer 2. 29 Aſſ. 60. If the iſſue in tail be outlawed of Felony in the life of his father, and getteth his Charter of pardon in the life of his father, after the death of his father he may enter; but by Thorp, If the iſſue in tail getteth his Charter of pardon after the death of his father, then the King ſhall have the profits of the lands during the life of the iſſue: And the Caſe of

3 Len. 75.

Cardinal

Cardinal Pool was debated in the Parliament, 27 Eliz. That he being Dean of Exeter, was ſeiſed of Lands in the right of his Church, and was attainted of Treaſon: It was holden, That he ſhould forfeit the profits of ſuch Lands: But admit, that by this Attainder the Land be forfeited, yet the party hath the Freehold until Office found: See Nicols's Caſe on the Commentaries: and ſee alſo the Caſe of the Dutchy in the firſt Commentaries. And here the Pardon hath diſpenſed with the Forfeiture. Tenant of the King alieneth in Mortmain, before Office found, the King pardons it, this is good. The Lord Poynings conveyed all his Lands to Sir Adrian Poynings, who was an Alien, and afterwards is made a Denizen, and the King pardons him, and releaſeth unto him all his right in the ſaid Lands without any words of Grant; and it was adjudged, the ſame ſhall bind the King. And he ſaid, that he had found a good precedent, 14 H. 7. where a general pardon before ſeiſure into the King's hands was allowed, contrary after ſeiſure without words of Grant. See Br. 29 H. 8. Charter of Pardon 52. If a man be attainted of Felony, and the King pardons him all Felonies, & executiones eorundem, the ſame ſhall not ſerve for life and Land, if no Office be found, but it ſhall ſerve for the Goods without words of Reſtitution and Grant; for the King is entituled to them by Outlawry without Office, but the King is not entituled to the Lands untill Office be found: See ibid. 33 H. 8. 71. The Heir intrudes, and before Office found the King pardons; now the Heir is diſcharged as well of the iſſues and profits, as of the Intruſion it ſelf, and alſo of Livery: But a pardon given after Office is available for the Offence, but not for the iſſues and profits: And he cited the Caſe of Cole in the firſt Commentaries, where a pardon was granted Meſne betwixt the ſtroke and the death: See 35 H. 6. 1. 1 E. 4. 1. 8 Eliz. Dyer 249. Brereton's Caſe, 11 Eliz. Dyer 284, 285. Cardinal Pool's Caſe.

Egerton, Solicitor to the contrary; This Traverſe is not good; for he that traverſeth, hath not made Title to himſelf as he ought, upon which the Queen may take Iſſue; for it is at the Election of the Queen to maintain her own Title, or traverſe the Title of the party. At the Common Law, no Traverſe lay but where the Livery might be ſued; but that is helped by the Statute of 34 E. 3. cap. 14. but where the King is entituled by double matter of Record (as in our caſe he is) no Traverſe is allowed until 2 E. 6. cap. 8. And in ſuch caſe two things are requiſite: 1. That the Office be untruly found: 2. That the party, who is to be admitted to his Traverſe, have juſt Title or Intereſt of Eſtate of Freehold, &c. But in our caſe, The Office is confeſſed by the Traverſe to be true, although that the Conveyance be not truly found: Alſo Harris, at the time of the Office found, had not juſt Title but an intereſt came unto him long time after the Office found: Alſo the Traverſe is not good, for he traverſeth the matter of the Conveyance, which is not traverſable; for if the King hath Title, non refert quomodo, or by what Conveyance he hath it. As to the matter in Law, (ſcil.) Tenant in tail in Remainder is attainted of Felony, if the King during the life of Tenant in tail ſhall have the freehold? and he conceived that he ſhould, for it ſhall not be in abeyance, and it cannot be in any other; for when he is attainted, he is dead as unto the King. The chief Lord cannot have it, for Tenant for life is alive, and alſo he in the Remainder in Fee, &c. the Donor ſhall not have it, for the Tenant in Remainder is not naturally dead, but civilly; and the Land cannot revert before the Tenant in tail be naturally dead without iſſue: but if there were any other in whom the Freehold might veſt and remain, then the King ſhould not have the Freehold, but onely the profits. So if the Tenant be attainted, the Lord ſhall have the Lands preſently; 3 E. 3. 4 E. 3. The Huſband, ſeiſed in the right of his Wife, is attainted of Felony; the King ſhall have but the profits, for the Freehold veſts in the Wife, and if the Lord entreth,

the Wife shall have an Assise. And Tenant in tail may forfeit for his life, as he may grant for his life: See Old N. B. 99. If Tenant in tail, for life, dower, or by the curtesie, be attainted of Felony, the King shall have the Lands during their lives; and after their deceases, he in the Reversion shall sue unto the King by Petition, and shall have the Lands out of the King's hands: and there it is farther said, That the Lord by Escheat cannot have it, for the party attainted was not his very Tenant, nor he in the Reversion, for the term yet endures. But now it is to see, if the Freehold be in the King without Office? and he conceived and argued, that it was: Where the King is entituled to an Action, there the King ought to have an Office, and a Scire facias upon it: as where the King is entituled to a Cessavit, Action of Waste, &c. 14 H. 7. 21. where the Entry in case of a common person is necessary, there it is requisite that there be an Office for the King: As if a Villain of the King purchaseth Lands, or an Alien born, &c. for a condition broken, Mortmain, &c. And in some cases, an Office is onely necessary to instruct the King how he shall charge the Officer for the profits which may be supplied as well by Survey, as by Office: as if the King be to take by descent, or as the Case is here. And true it is, that a person attainted of Felony may during his Attainder purchase Lands, and yet he cannot hold it against the King: and it is clear, that by the Common Law in such cases, the Land was in the King, but not to grant, for the Statute of 18 H. 6. was an impediment to it: but now that defect is supplied by the Statute of 31 H. 8. cap. 20. So that now the King may grant without Office: See Doughtie's Case, 26 Eliz. And in our Case, an Office is not necessary to entitle the King, but for explaining of his Title: and see 9 H. 7. 2. The Lands of a man attainted of High Treason are in the King without Office; so where the King's Tenant dieth without heir; or Tenant in tail of the Gift of the King dieth without issue: See Br. Office before the Escheator 34. and see 13 H. 4. 270. A man is attainted of Treason, the King before Office grants his Lands and Goods. Things which lie in Grant, as Advowsons, Rents, Remainder, such things upon Attainder are in the King without Office. As to the general pardon of 23 Eliz. he said, That that doth not extend to this Case; and that this interest of the Queen by this Attainder doth not pass by that pardon out of the Queen, so if the Queen had but a Right or Title onely.

Popham, Attorney General; By this Attainder the Estate of him in the Remainder in tail, accrueth unto the Queen for the life of him in the Remainder; for by our Law, Felony is punished by the death of the Offendor, and the loss of his Goods and Lands for the examples of others, therefore nothing is left in the party: Tenant for life is attainted of Felony, the King pardoneth him his life, yet he shall have his Lands during his life, and he may dispose of the same for his life: And so is it of Tenant in tail, for he may forfeit all that which he hath, and that is an Estate for his life, which is a Freehold. If Lands be given to one and his heirs for the term of the life of another, and the Donee be attainted of Felony, the King shall have the Land during the life of Cestuy que vie, for the heir cannot have it, because the bloud is corrupt, and there is not any occupancy in the case: for 17 E. 3. the Justices would not accept of a Fine for the life of another, because there might be an Occupant in the case: But for a Fine of Land to one and his heirs for the life of another, they would take a Fine, for there is no mischief of occupancy. Land is given to A. for life, the Remainder to B. for life, the Remainder to the right heirs of A. who is attainted of Felony; B. dieth, now the King hath the Fee executed. And here in our Case, If the Tenant for life had been dead, no Præcipe had lien against him in the Remainder being

being in poſſeſſion, but the party who hath right is to ſue unto the King by Petition. 4 E. 3. If one ſeiſed of Lands in the right of his Wife for life be attainted, the King ſhall have exitus & proficua: but he conceived that Caſe not to be Law: For ſee F. N. B. 254. D. The Husband ſeiſed in the right of his Wife in Fee, is outlawed for Felony, the King ſeiſeth, the Husband dieth; now ſhall iſſue forth a Diem clauſit extremum, the words of which Writ in ſuch caſe are, Quia A. cujus Terr. & Tenement. quæ ipſe tenuit de jure & hæreditate M. uxoris ſuæ adhuc ſuperſtitis occaſione ejuſdem Utlagar' in ipſum pro quadam Felonia unde indictatus fuit, &c. in Man. Domini H. patris noſtri extiterunt, &c. therefore the King had not the iſſues onely, but alſo the Lands: See to the ſame purpoſe the Regiſter 292. b. Stamford's Placita Coronæ, 186. 187. affirms, That Tenant in tail being attainted of Felony, ſhall forfeit his Lands during his life. And he ſaid, that the Eſtate of Thomas Venables was in the King without Office not to grant, for that is reſtrained by the Statute of 18 H. 6. but it is in him before Office, ſo as he who hath right ought to ſue to the King by Petition, if he will have his Land: yet he conceived, that before the Statute of 18 H. 6. the King might grant the Land before Office, as it appeareth by Thirning, 13 H. 4. 278. who was before the ſaid Statute: So if the King's Tenant makes a Leaſe for years, the Remainder over to another in Fee, who dieth without Heir; the Remainder is in the King without Office, becauſe a common perſon in ſuch caſe cannot enter, but a claim is ſufficient, and therefore it ſhall be in the King without Office. As to the pardon, he ſaid, That it doth not extend to this Eſtate, for this is a Freehold, ergo, not within the pardon: As if the King's Tenant be attainted of Felony, and the King pardons him all offences, and all things which he may pardon, theſe words ſhall not go nor extend to Freeholds, but onely unto perſonal matters, and ſuch punishments and peins which do concern Chattels. But it may be objected, That by this pardon, Title of Quare Impedit, and Re-entries for Conditions broken are excepted; and therefore if they had not been excepted, they had been remitted by the pardon; and therefore this pardon ſhall extend to Inheritances and Freeholds: As to that, I ſay, That ſuch Exceptions were not in uſe in the time of H. 4. and yet Inheritances and Freeholds were not taken to be within ſuch pardons, and ſuch Exceptions did begin 5 Eliz. And he ſaid, he had been of Council in ſuch Caſes where it hath been taken, that ſuch pardons did not extend to Freeholds: As an Abbat was diſſeiſed, and afterwards during the Diſſeiſin the Abby is diſſolved; the King makes ſuch pardon, the ſame doth not transfer the Right of the King, and in that Pardon are divers Exceptions of Goods and Chattels in many caſes, and therefore it cannot be intended that the pardon doth extend to Freeholds. And ſee the ſaid Act of pardon: The Queen grants all Goods, Chattels, Debts, Fines, Iſſues, Profits, Amercements, Forfeitures, Sums of Moneys; which word [Forfeiture] ſhall be intended of a perſonal Forfeiture, & non aliter, for it is coupled with things of ſuch nature. And as to the Traverſe, he ſaid, It did not lie in this Caſe; for the Office is not untrue, but true in ſubſtance, although void in circumſtance: And alſo the King here is entituled by double matter of Record, (ſcil.) the Attainder and the Office: and he ſaid that the Statutes of 34 and 36 E. 3. which gave Traverſe, are to be intended of Offices found virtute Officii, and not virtute Brevis, for then Eſcheators were very troubleſome: And the Statute of 2 E. 6. doth not give Traverſe, but where the Office is untruly found; as if Tenant of the King be diſſeiſed, and the Diſſeiſor be attainted; the Queen ſeiſeth the Land: Now the Diſſeiſee hath not remedy by Traverſe upon the Statute of 2 E. 6. but is put to his Monſtrans de Droit, for the Office is true: But if I

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be Tenant of the King, and ſeiſed of Land accordingly, and it was found that J. S. was ſeiſed of my Land, and attainted, &c. whereas in truth he had not any thing in my Land, there Traverſe lieth, for the Office is falſe; and ſo in our Caſe, for the Traverſe it is at the Common Law: and it was true that Venables was ſeiſed.

Coke to the contrary; and he ſaid, That by the Attainder the Queen hath gained but a Chattel; and that notwithſtanding this Forfeiture, if Venables had been in poſſeſſion, a Præcipe ſhould be brought againſt him: And where it hath been ſaid by Mr. Attorney, That Writs ſet down in the Regiſter are the beſt Expoſitours of our Law, the ſame is not ſo; for the Regiſter ſaith, That Waſte lieth notwithſtanding a Meſn Remainder, which is not now Law, but it hath been clearly ruled to the contrary: and ſee accordingly 50 E. 3. the Regiſter therefore and the Writs are ſubject to the Judgment of our Law; and the Writ of Diem clauſit extremum is not to the contrary; for I confeſs, that in ſuch caſe the Land ſhall be ſeiſed into the hands of the King, but the King ſhall not have but a Chattel therein: It hath been argued, It may be granted, therefore it may be forfeited; Nego Conſequentiam: for a man ſeiſed in the right of his Wife, may grant, but not forfeit: Gardian in Socage may grant, but not forfeit; the Husband may grant a term for years, which he hath in the right of his Wife, but he cannot forfeit it. A woman Inheretrix taketh a Husband, who afterwards is attainted of Felony, the King pardons him, they have iſſue, the Husband ſhall be Tenant by the curteſie, which proveth, that the King hath not the Freehold by that Attainder. Before the Statute of Weſtm. 2. Tenant in tail, poſt prolem ſuſcitatam, might forfeit his Lands, but now the Statute hath ſo incorporated the Eſtate tail to the Tenant in tail, that it cannot be deveſted, even a Fine levied by him ipſo jure nullus, although as to the poſſeſſion it be a Diſcontinuance; and that is the reaſon wherefore Tenant in tail ſhall not be ſeiſed to another's uſe. See Stamford 190. The Husband ſeiſed in the right of his Wife is attainted of Felony, the King ſhall have the profits of the Lands of the Wife during the life of the Husband, &c. So if Tenant in tail be attainted of Felony, and that is but a Chattel in the Lands of the Wife, and alſo in the Lands of the Tenant in tail: and if the poſſeſſions of a Biſhop be ſeiſed into the Queen's hands for a Contempt, in ſuch caſe the Queen hath the poſſeſſion, and not the profits onely: the ſame Law of the Lands of Tenant in tail, or for life, being attainted of Felony: ſo of ſeiſure for Alienation without licenſe, or of the poſſeſſions of Priors, Aliens. See Brook Reſeiſer 10. So where the Seiſure is for Idiocy. And he ſaid, That in the principal Caſe nothing is in the King until Office: and as to the Caſe of 13 H. 4. 6. he confeſſed the ſame; for at that time many, and amongſt them Lawyers and Juſtices, were attainted by Parliament, and ſo was Sir John Salisbury, whoſe Caſe it was; and their Lands by Act of Parliament given expreſſly to the King: and therefore I grant that their Lands were in the King before Office. Tenant in Fee of a common Lord is attainted of Felony, his Lands remain in him during his life until the Entry of the Lord, and where the King is Lord untill Office be found: but in the Caſe of a common perſon, after the death of the perſon attainted, they are in the Lord before Entry, and in the Caſe of the King before Office, for the miſchief of abeyances. And ſee the Lord Lovel's Caſe, 17 and 18 Eliz. 485, 486. Plow. where it is holden, That upon Attainder of Treaſon by Act of Parliament, the Lands were not in the King without Office in the life of the party attainted, upon the words of the Act, ſhall forfeit. See Stamford Prerogat. 54, 55. acc. He ſaid, That this intereſt which came unto the King by this Attainder, is but a Chattel, and then it is remitted by the Pardon; and ſo he conceived, if it be a Freehold: For the words of the general

Roll. Tit. Grant. 4 Len. 112. ac. Godb. 351. a.

general Pardon are large and liberal, [Pardon and releaſe all manner of Treaſons, &c. and all other things, Cauſes, &c.] and here Forfeitures are pardoned; and this word [things] is a tranſcendent, &c. and although it be a general word, yet by the direction of the Act of general Pardon it ought to be beneficially expounded and extended, as if all things had been ſpecially ſet down: Alſo the words are, [Pardon them and their Heirs,] therefore the Pardon extends to Inheritance, for otherwiſe there is no uſe of that: And he conceived, That by the firſt branch of this Act, that the ſame extends to Inheritances, and to acquit the Lands of all incumbrances, for every Offence not excepted, for there is the word [Heirs,] and the third branch concerns onely Chattels, and that is by the word [Grant,] where the firſt is by words of acquittal: See 33 H. 8. br. Charter of Pardon 71. Tenant of the King dieth ſeiſed, the Heir intrudes, Office is found; by Pardon of Parliament all Intruſions are pardoned; in that caſe the Offence is pardoned, but not the iſſues and profits of the Lands; but by a Pardon before all is pardoned. But here in our caſe the Office is not void; for the Statute makes all Precepts, Commiſſions, &c. void, being awarded upon ſuch forfeiture. See alſo in the ſecond branch, Vexed or inquieted in Body, Goods, or Lands: and ſee alſo among the Exceptions, That perſons ſtanding indicted of wilfull Murther, and Forfeiture of Goods, Lands, Tenements, grown by any offence by ſuch perſon: By which he ſaid, that if ſuch Exception had not been, the Land of ſuch perſon, if he had been attainted upon ſuch Indictment, ſhould be forfeited: as to the Traverſe, he ſaid, That becauſe the Office is true, our Plea is in the nature of Monſtrans de Droit, although it concludes with a Traverſe: We vary from the Office in number of the perſons, and in the day of Feoffment, and every circumſtance in caſe of the King is to be traverſed, and our Plea in ſubſtance confeſſeth and avoideth the Offence. Although that here the King be intituled by double matter of Record, (ſcil.) the Attainder and the Office: yet one of the ſaid Records, (ſcil.) the Attainder, is diſcharged by another Record, (ſcil.) the Pardon, and then but one Record remains, (ſcil.) the Office, and therefore our Traverſe well lieth. And he ſaid, that by the common Law there was a Traverſe; as where it was found by Office, that the Leſſee of the King had committed Waſte, or had ceſſed for two years; and that in ſuch caſe the Leſſee and Tenant, in an Action brought againſt them, may traverſe the Offence; therefore there was a Traverſe at the common Law, where the King was entitled by ſingle matter of Record: So upon Office finding Alienation without Licence, there was a Traverſe by the common Law: See Traverſe in ſuch caſe in the Caſe of William de Herlington, 43 Aſſ. 28. See Br. Traverſe of Office 54. Petition is by the common Law, and Traverſe by the Statute: Frowick in his Reading. See Stamf. Prerogat. 60. That Traverſe in caſe of Goods was at the common Law, but for Lands by Office, by 34 E. 3. 14. for before the remedy was by Petition. See Co. 4. part. the Sadler's Caſe 55, 56. Traverſe was at the common Law concerning Freehold and Inheritance, but that was in ſpecial Caſes, (ſcil.) when by the Office the Land is not in the King's hands, nor the King by that is in poſſeſſion, but onely by the Office is entitled to an Action, and cannot make a Seiſure without Suit, for there in a Scire facias brought by the King in the nature of ſuch Action to which he is entitled, the party may appear to the Scire facias, and traverſe the Office by the common Law. It was adjourned.

Mich.

*Mich.* 29 *Eliz.* In the King's Bench.

## CLXX. Scott *and* Scott's *Case.*

1 Cro. 73.
3 Len. 225.
4 Len. 70.

IN a Replevin, betwixt Scott and Scott, the Case was, George Scott, 2 H. 8. being Tenant in tail of certain lands, suffered a common Recovery to the use of his last Will; and 15 H. 8. made his Will, by which he did declare, That the Recoverors should make a good and favourable Lease to Hugh Scott his younger brother: and 25 H. 8. they make a Lease of the same land to the said Hugh for 199 years according to the Will of the said George Scott, rendring Rent, 11 l. 6 s. 8 d. payable at the Feast of the Annunciation and S. Michael, by equall portions, and that to the Recoverors, their Heirs and Assigns; and there was a Covenant, that after the death of the Recoverors, the said Rent should be paid to Cestuy que use, his Heirs and Assigns, any thing in the said Indenture notwithstanding. Proviso, That if the Lessee make his Heir male his Assignee of that term, that then he shall pay the said Rent to the Recoverors, their Heirs and Assigns, and the Lessee shall not pay the Rent to the Heirs of Cestuy que use, upon which a Distress is taken, and thereupon a Replevin brought. Drew argued for the Plaintiff: When a Condition is created, the Law saith, That it shall be taken and construed favourably in the behalf of him who is to perform it: As if one be bounden to appropriate such a Church to such a house before such a day at his own costs, and the Obligor grants a Pension out of the said Parsonage, and afterwards appropriates the said Church, it was holden that the Condition was well performed, 3 H. 7. 4. A Lease for years upon condition, to scowre the Ditches, if the Lessee scoureth them once, it is well enough: And as to this word Proviso, It is to see, If here it be a word conditional: In some Cases, this word Pro, makes a Condition, as 45 E. 3. 8. Grant of a Ward, pro bono servitio, if the Grantee departeth out of his service, the Grant is void: So if an Annuity be granted unto a Physician pro consilio impendendo, the same is a Condition, 41 E. 3. 6. For the Grantor hath not means to compell the Grantee to give his Council; but in some Cases, this word Pro, doth not make a Condition: As if before the Statute of West. 3. Land was given pro homagio suo, there, if the Homage be not done, the Feoffor could not re-enter, but he ought to distrain. And I conceive, that in our Case, Proviso doth not make a Condition. 7 H. 6. 44. A Feoffment in Fee with Warranty, Proviso, that the Feoffee shall not vouch: So a Grant of a Rent-charge, Proviso, that the Grant shall not extend ad onerand. personam of the Grantor; for here the Proviso is rather an Exception than a Condition: A Lease for years without impeachment of Wast, Proviso, that he shall not do voluntary Wast, the same is a Qualification of the liberty for doing Wast. Grant of a Manor, Proviso, that it shall not extend to wood growing upon the Manor, the same is an Exception, not a Condition. See the Bishop of York's Case, 5 Eliz. Dyer 222. The said Bishop made a Lease for certain years of certain Lands, Proviso, quod tempore vacationis, the Rent shall be paid to the Chapter, It was holden that the Proviso was not a Condition. And here in this Case, the Will of George Scott was, That the Recoverors should make to the said Hugh, a favourable Lease, which cannot be, if it be a conditional Lease: Another point was; because the Rent is not well demanded; for he hath demanded the whole Rent of the year, whereas but half a years Rent was onely due. Coke, contrary: where the Proviso is parcel of one sentence which contains a Covenant, or abridgeth the Covenant, there it shall not amount to a Condition, but to an Exception, as a Grant of a Rent-charge,

Proviso,

Proviſo, that he ſhall not charge the perſon, abridgeth the force of the Grant: ſo a Leaſe without impeachment of Waſt, Proviſo, that the Feoffee ſhall not do voluntary Waſt, the ſame abridgeth the liberty; But in our Caſe, this Proviſo makes a Condition, and not a Qualification of the ſentence, or of any Covenant contained in the ſentence, nor doth it participate altogether with the ſentence, but ſtands ſubſtantively, for it was a full ſentence before: A Feoffment in Fee with Warranty, Proviſo, that when he is impleaded, he ſhall not vouch J. S. the ſame is a good Condition, for J. S. is a ſtranger: contrary, that he ſhall not vouch the Feoffor: And a Proviſo never makes a Covenant, and therefore it ſhall be either a Condition, or void. And he ſaid, That by the deviſe, Hugh Scott had a Leaſe without any Leaſe to be made by the Recoverors. As unto the demand of the whole Rent, where but half a years Rent was due, the ſame is good enough. And ſo was it adjudged in a Caſe betwixt Andrew's and the Lord Cromwell; for he is at his peril to pay the one moyety, and in as much as he denieth the whole, he denieth every part. It was adjorned.

*Mich.* 29 *Eliz.* In the King's-Bench.

## CLXXI. Hawkins's *Caſe.*

ONE Hawkins was ſeiſed of three Meſſuages in Bury in his Demeſn as of Fee, and had iſſue, Robert, Chriſtian, and Joan; and devi-ſed all his ſaid Meſſuages to his wife for life, the remainder of one of the ſaid Meſſuages to his ſon Robert and his heirs; the remainder of another of his ſaid Meſſuages to his daughter Chriſtian and to her heirs, and the remainder of the third Meſſuage, to Joan and her heirs. And farther, by his Will devited, That if any of his ſaid iſſues die without iſſue of his body, that then the other ſurviving ſhall have totam illam partem, &c. between them equally to be divided. The Deviſor dieth, the wife of the Deviſor dieth, Joan dieth, having iſſue, Robert dieth without iſſue, Chriſtian entreth into all the houſe of Robert, and dieth, and her husband holds in as Tenant by the Curteſie. Coke, The ſurviving child ſhall have the whole, and the iſſue of Joan ſhall have nothing; and he ſaid, That by this Deviſe, they have an Eſtate in tail, for the Fee doth not veſt in any of them; for it is written, Who ſhall ſurvive: But when one overlives, he ſhall have in Fee, for theſe words, totam illam partem, go to the whole Eſtate, as well as to the whole Land. I deviſe my Land wholy to one, he hath Fee thereby: And he ſaid that the three Deviſees have Fee-tail, and Fee expectant each ſeverally as to the Meſſuage to him limited. Golding, contrary; Each hath an Eſtate tail in the houſe deviſed to him, and but an Eſtate for life, expectant upon the death of the other without iſſue, for there are no words by which it may appear what Eſtate he ſhall have by the ſurvivorſhip. I grant the Caſe which Perkins denies, but Littleton affirms (ſcil.) A Deviſe to one of lands in perpetuum; for there the intent appeareth; But where there are not words of Inheritance, nor words amounting to ſo much, then it ſhall be but an Eſtate for life: And as to the words, totam partem illam, the ſame is all one as if he had ſaid, partem illam without the word totam. And alſo he ſaid, That where one onely ſurvives, no farther the Eſtate veſts; for there ought to be two to take by the ſurvivor; for the words are, Equally to be divided betwixt them, And then if it cannot accrue by ſurvivor, then it ſhall deſcend; and if it had accrued to two by the ſurvivor, they ſhall be thereof Tenants in common, not Joynt-tenants by reaſon of theſe words, Equally to be divided. Clench, Juſtice, The words, Totam illam partem, go to the houſe, and not to the Eſtate in it: Shute, Juſtice, accordingly: and he

Poſtea 193. 1 Cro. 53. 3 Len. 180.

ſaid, If both daughters had ſurvived, they ſhould have Fee in the houſe of Robert, but not by the Will, but by deſcent in coparcenary: Alſo when two are dead, the ſon and one daughter, then it cannot be divided, therefore the Will as to that is void, and then the common Law ſhall take place, and put the houſe to the iſſue of one daughter, and of the other daughter ſurviving. Gawdy, Juſtice, here is but an Eſtate for life in the ſurvivor; It hath been objected, That then having but an Eſtate for life, the ſame Eſtate is drowned by the deſcent of the Fee-ſimple, ſo as now the Eſtate limited by the Will, is void; To which it may be anſwered, That although now, upon the matter it be void, yet, Ab initio, it was not ſo; for it became void by matter of later time, (ſcil.) by the deſcent of the Fee-ſimple; for if one of the daughters had died without iſſue before the death of Robert, ſo as the houſe of ſuch daughter ſhould have come to the ſaid Robert and the other ſiſter, there is no coparcenary, for the ſon hath all the Fee, and the moyety of the ſame is executed, and the other moyety expectant, and the ſiſter hath a moyety for life, and then the Deviſe not void: Alſo here are not two ſurvivors, ſo nothing is to be divided, and therefore the Law ſhall ſay, that the houſe of Robert is deſtended, (ſcil.) the Fee of it to the daughter of Chriſtian and Joan, and ſo Judgment was given againſt the huſband, who claims to be Tenant by the Curteſie of the whole Meſſuage.

*Paſc.* 27 *Eliz.* In the Common Pleas.

## CLXXII. Wye *and* Throgmorton's *Caſe*.

IN Debt upon a Bond by Wye, againſt Throgmorton, The Condition of the Obligation, was to perform Covenants in a pair of Indentures; And the Covenant wherein the breach was aſſigned was, That if R. W. Brother of the Plaintiff, ſhould ſay, Make aſſurance of ſuch a Manor to the Defendant, as the Council learned of the ſaid Defendant ſhould adviſe, Then if the Defendant pays unto the Plaintiff 50 l. the Obligation to be void; The Defendant by advice of Council, demanded a Releaſe with Warranty, &c. And by Periam and Windham, The ſame is not any Aſſurance, but a means to recover in value. Anderſon, contrary: That it was a Collateral Warranty, &c.

*Hill.* 28 *Eliz.* In the King's Bench.

## CLXXIII. Cropp *and* Hambleden's *Caſe*.

1 Cro. 48. IN Treſpaſs by Cropp againſt Eraſmus Hambleden, upon the ſpecial Verdict, the Caſe was; That one Martin Haſtings was ſeiſed of the lands, where, &c. in the right of his wife, for the life of the wife; and that they both did Leaſe unto the Defendant for years, rendring Rent, payable at the Feaſt of S. Michael, and the Feaſt of the Annunciation, &c. with clauſe of re-entry, if the Rent be behind, by a Month after any of the ſaid Feaſts, and after the feaſt of S. Michael, 26 Eliz. and before the Month expired, the Leſſee, the now Defendant, ſent his ſervant unto the houſe of the Leſſor, for to pay to him the Rent then due; the ſervant went unto the houſe of the Leſſor, and there asked for him, to whom it was anſwered by one Mary Briggs, daughter of the wife of the Leſſor, who there dwelt in the ſaid houſe with her mother, that the Leſſor was not at home, for which the ſaid ſervant delivered the ſaid Rent to the ſaid Mary, requiring her to deliver the ſame over to the Leſſor, upon his return to the houſe, in the name of his ſervant;

Mary

Mary reſerved the ſaid Rent, and upon the return of the Leſſor, at his houſe, told him all the matter aforeſaid, and that the ſervant of the Leſſor, the Defendant, had required her to tender the ſaid Rent to the Leſſor, in the name of the Defendant, and thereupon offered and tendered to him the ſaid Rent, and the Leſſor refuſed it. And the Jury found, That the third half year before the tender mentioned before, the Leſſor commanded the ſaid Mary to receive the Rent then due, who did accordingly, and that the next half year then following, the ſaid Mary did receive the ſaid Rent, without commandment of the Leſſor, but after the Leſſor agreed unto it, and that the immediate half year before this tender in queſtion, the Defendant paid the Rent then due, to the Leſſor himſelf, who received it, And it was the opinion of Wray, chief Juſtice, that this tender was good, and it is not like unto the caſe of an Obligation; for there the Obligee cannot have an Action of Debt before the laſt day: but here the Leſſor might have diſtrained, or have had an Action of Debt before the Month expired, and ſo the Leſſor is bound by this tender; and by Gawdy, Juſtice, This tender cannot be ſaid a tender by a ſtranger, for here Mary came in privity of the ſervant of the Leſſee, and as it is found by Verdict, Mary tendered it to the Leſſor, as being requeſted by the ſervant of the Leſſee: And afterwards, upon conſideration had betwixt the Juſtices themſelves; the Juſtices, viz. Clench, Gawdy and Wray, (for Shute was then ſick) it was clearly reſolved againſt the Plaintiff, and that the ſaid tender, as it is found in the Verdict, is a good and ſufficient tender; and the Lord Wray delivered the reaſon, as before, and farther ſaid, That if the ſaid Rent had been reſerved payable at the feaſts aforeſaid, or within a Month after each of them, there the tender as above, had not been good, nor ſhould bind the Leſſor; for in ſuch caſe the Leſſor could not diſtrain, or have an Action of Debt for the ſaid Rent before the Month expired. And this is a caſe of extremity, and deſerves no favour; and here is no miſchief to the Leſſor, for he might have had his Rent in due time if he would, and his captious refuſal ſhall not avail him; And Judgment was given accordingly.

*Trin.* 33 *Eliz.* In the Common-Pleas.

## CLXXIV. Boſtock *and* Covert's *Caſe.*

BOſtock and his Wife brought a Writ of Dower againſt Covert, ſon and heir of her former Husband, who pleaded, That the Husband of the Demandant was ſeiſed of Lands, amounting to the number of 300 Acres; and held the ſame by Knights-ſervice, and died ſeiſed, after whoſe death, by virtue of the Statute of 34 and 32 H. 8. he entred into 100 Acres of the ſaid Lands, as the third part of the ſaid Lands deſcended, and held the ſame in ſeverality, being the third part of the clear yearly value of the whole diſcharged of a Dower; and that the Wife ought to have all her Dower out of the two parts deviſed. And Anderſon ſaid, That the Plea was not good; for the heir who will take advantage of the Statute in that point, ought to enter generally as Tenant in common with the Deviſee, and then in a Writ of Dower it is a good Plea: ſo if after his entry as Tenant in common Partition be made betwixt him and the Deviſee, ſuch a Plea is good; but here he hath entred ſeverally into a third part, diſtinct from the reſidue, and ſo hath ouſted the Deviſee of a third part ſeverally; for which cauſe he cannot have advantage of this Plea: To which the reſt of the Juſtices, Non contradixerunt.

*Paſch.* 37 *Eliz.* In the Exchequer.

## CLXXV. *Sir* John Southwel's *Case.*

3 Len. 147. SIR John Southwel of the County of Lancaſter, 7 Julii, 19 Eliz. made a Conveyance of his Lands to divers Feoffees and their heirs, upon condition, that they ſhould find him and his Wife, and ſo many perſons in his houſe, &c. prefer his Daughters in marriage, pay his debts, &c. And if there fell out at the years end upon accompt made by the Feoffees any ſurpluſage, that then at the end of every ſuch year, they ſhould anſwer ſuch ſurpluſage as ſhould then remain in their hands unexpended of the Rents and profits of his ſaid Lands; with clauſe of revocation, &c. Afterwards, the ſaid Conveyance being in force, came the Statute of 29 Eliz. concerning Recuſants; upon which Statute, the ſaid Southwel is now endicted; and afterwards upon a Commiſſion iſſuing out of the Exchequer to the Sheriff of Lancaſter, to enquire of the Lands of the ſaid Southwel, although againſt the ſaid Conveyance it was given in Evidence, That after the ſaid Conveyance, the ſaid Sir John Southwel had granted Trees from off the ſaid Lands, and had received Fines and Incomes for Leaſes, &c. yet the Jurors charged to enquire, would not find that the ſaid Sir John Southwel had any Lands, &c. And by ſpecial command from the Queen, it was referred out of the Exchequer, to all the Judges of England, If the Lands of the ſaid Sir John Southwel conveyed as aforeſaid, were ſubject to the ſaid Statute, and the penalties thereof. And upon a great deliberation, it was by them all reſolved and agreed, That notwithſtanding the ſaid Conveyance, the ſaid Lands were liable to the ſaid Statute. And as to the Jurors, who againſt the Evidence given to them for the Queen, gave their Verdict (ut ſupra) Proceſs was awarded againſt them out of the Court of Exchequer, for to appear before the Lord Treaſurer and the Barons. And for their ſaid contempt, they were committed to the Fleet, and each of them fined 50l.

*Trin.* 27 *Eliz.* In the Exchequer.

## CLXXVI. Moore *and* Savil's *Case.*

IN an Ejectione firmæ, by Moore againſt Savil, the Caſe was, That Tenant in tail leaſed the Land to the father, mother and ſon for their lives, by Indenture, in which it was comprehended, That forſaſmuch as the Leſſor is but Tenant in tail, and ſo cannot by Law limit theſe Eſtates by way of Remainder, but jointly in poſſeſſion; and his intent was, That becauſe this Leaſe was procured and obtained at the ſpecial ſuit, and coſts and charges of the father, That the ſaid ſon ſhould ſuffer his father, and after him his mother, to take the profits of the ſaid Lands demiſed, and to occupy and hold the ſaid Lands to their onely profit without interruption of the ſaid ſon, notwithſtanding his joint Eſtate in poſſeſſion with them, Proviſum igitur eſt, That if the ſaid ſon ſhall challenge, claim, demand or take any profits of the Lands ſo demiſed, or enter into the ſame, during the life of his ſaid father or mother, That then the Eſtate to him limited by the ſaid Indenture ſhould ceaſe, and be utterly void. And it was the clear opinion of the whole Court, That this Condition and Proviſo was utterly void, for it is contrary to the Eſtate limited before; as in the Caſe cited by Coke at the Bar. If I leaſe to you my Lands for 20 years, Proviſo, that you ſhall not occupy the ſame the two firſt years, the ſame Proviſo is void and contrary, and repugnant to the Eſtate.

*Mich.*

*Mich.* 28 *Eliz.* In the Star-Chamber.

## CLXXVII. *Lord* Cromwel *and* Townſend's *Caſe.*

HEnry Lord Cromwel, exhibited a Bill in the Star-Chamber, againſt Roger Townſend, Eſquire, for that the ſaid Roger Townſend, in an Action betwixt James Taverner Plaintiff, and James Cromwel Farmor, of the ſaid Lord Cromwel Defendant, in Treſpaſs, in the favour and unlawfull maintenance of the ſaid Taverner, did procure a partial Jury to be returned. And upon the hearing of the Cauſe, the matter given in Evidence was, That the ſaid Taverner was a Copiholder of the ſaid Lord Cromwel, and that the ſaid Lord Cromwel, pretending that the ſaid Taverner had forfeited his Copihold, cauſed the ſaid James Cromwel to make an Entry, in the right of the ſaid Lord, upon the ſaid Taverner; upon which Entry, Taverner brought an Action of Treſpaſs againſt the ſaid James Cromwel, in which Action the parties were at Iſſue upon the forfeiture. And before any Venire facias iſſued forth, Taverner hearing that one Steward, who was Bailiff of the Franchiſe, under the Earl of Arundel, and who ought to make the Pannel, &c. was purpoſed to have made the ſaid Pannel not duly; viz. to return therein, great Gentlemen of the County, who were Lords of Manors, in favour of the ſaid Lord Cromwel, went unto the ſaid Roger Townſend, who was then one of the principal ſervants and agents of the ſaid Earl, and ſhewed to him, that if thoſe great perſons and Lords of Manors be returned for the trial of that Iſſue, peradventure they would not ſo eaſily appear for the expedition of the parties, as people of leſſer condition; and alſo many of them being Lords of Manors, and having cuſtomary Tenants, and therefore not indifferent to try that Iſſue, and prayed his Order to the ſaid Steward, for the making of an indifferent Pannel; where, upon a conference with the ſaid Steward for the making of an indifferent Pannel, and ſhewing to him, the making of the ſaid Pannel was not convenient, or any equal courſe to return Knights, Eſquires or Lords of Manors, but rather ſuch ſufficient perſons, for the greater expedition of Juſtice, and indifferency of the trial; And afterwards the ſaid Taverner exhibited a Petition, ſhewing all the ſpecial matter, and praying him to give Order for the making of an indifferent Pannel for the trial of that Cauſe, which Petition was delivered to the ſaid Earl by the ſaid Townſend, in the name of the ſaid Taverner. Upon which the Earl did refer the ſaid matter to three of his chiefeſt agents and Counſellours, i. Dickſey, Townſend and Carrel, and delivered to them the Book of Freeholders within the ſaid Franchiſe, who, according to their Commiſſion made a Pannel, which was returned; and the Jury paſſed with the ſaid James Cromwel in the right of the ſaid Lord: And if this intermedling of Townſend with this matter, as aboveſaid, &c. eſpecially his conference with the Bailiff, be maintenance or not, was the Queſtion. And by the Lord Anderſon and the Lord Wray, chief Juſtices, It was delivered for Law, That becauſe the ſaid Townſend was in manner a ſervant of the ſaid Earl, who had return of Writs, and one of his principal Counſellours and agents, and hearing, Ex inſinuatione, of the ſaid Taverner, the miſdemeanour of the Bailiff of his Lord could not do better, than to ſhew to the Bailiff his duty, for it concerned the honour of his Lord, and alſo his Inheritance in the Franchiſe; But if the ſaid Townſend had been a mere ſtranger to the ſaid Earl, ſo as no ſuch privity had been betwixt them, it had been clearly maintenance in Townſend; as it was lately adjudged in this Court, in the Caſe of one Gifford; where the parties being at Iſſue, and a Venire facias was to the Sheriff to return a Jury, a ſtran- Gifford's Caſe.

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ger wrote to one of the Jurors who was returned in the Pannel, praying him to appear at the day, and to doe in the Cauſe according to his Conſcience; and that was adjudged Maintenance. And afterwards, upon the full hearing of the cauſe, the ſaid Townſend, by the ſentence of the ſaid Court, was acquitted of every Maintenance, with great allowance and approbation of many Lords of the Council there preſent: Bromley Cancellario tantum exclamante.

## 33 *Eliz.* In the Exchequer.

### CLXXVIII. *Sir* Moil Finch's *Case.*

2 Roll 184. 1 Cro. 220. Poph. 25. 1 Roll 215.

THE Caſe was this; The King and Queen, Philip and Mary, leaſed for ſeventy years for certain Rent payable at the Feaſts of Saint Michael and the Annunciation; Proviſo, that if the Rent be behind, and not paid by the ſpace of forty days after any of the Feaſts aforeſaid, that the Leaſe ſhall ceaſe and be void. At Mich. 9 Eliz. the Rent was not paid according to the Proviſo, but a Month after the ſaid forty days it was paid, and Acquittance given for it; and ſo the Rents due after unto 30 Eliz. were duly paid, and Acquittances given for the ſame. The Queen gave and granted the Reverſion in Fee to Sir Thomas Henage, &c. and after it was found by Office that the Rent was arrear, ut ſupra: Sir Thomas Henage entred, and leaſed for years to Sir Moil Finch, who being ejected, brought a Quo minus in the nature of an Ejectione Firmæ, &c. It was argued by Coke, That this Leaſe upon the matter aforeſaid is avoidable by the Patentee, and that without Office; for the concluſion of the Proviſo is not, that the Queen ſhall re-enter, but that the Leaſe ſhall ceaſe and be void: and the Queen is not driven to demand her Rent, as in ſuch caſe a Subject is tied. And he compared it to the Caſe of a common perſon; If a common perſon leaſeth for years, upon condition, that if the Leſſee doth not build upon the Land demiſed a Houſe within a year after, that the Leaſe ſhall be void, and afterwards grants the Reverſion to a ſtranger: the Grantee ſhall have advantage of this Condition, be it broken before or after the Grant; for the Leaſe in ſuch caſe is void, not onely voidable; and the reaſon is, becauſe the Condition is collateral: which ſee 11 H. 7. 17. A Leaſe for years is made upon Condition, that if the Leſſee doth not go to Rome before ſuch a day, that the Leaſe ſhall be void; the Leſſor grants the Reverſion over, the Leſſee attorns, and doth not go to Rome within the time appointed, the Grantee may re-enter; contrary, if the concluſion of the Condition had been by way of re-entry, for then it ſhould run in privity by the Common Law: But where a Leaſe with ſuch Condition was made for life, with this concluſion of the Condition, that the Leaſe ſhall be void, the Grantee ſhall not take advantage of that by the Common Law, for there the Eſtate is not void untill re-entry, for there is a Freehold which ought to be avoided by Entry: But in our Caſe the Condition is upon the matter collateral, for no demand is requiſite to take advantage of the Condition. And he ſaid it is a general Rule, where in the Caſe of a common perſon an Eſtate may be deveſted without Entry, there in the Caſe of the Queen there needs not any Office; but here in our Caſe, if it had been a Caſe of a common perſon, the Eſtate ſhould be deveſted without Entry, therefore in the Caſe of the Queen without Office: See Stamford for the Major Propoſition 55. but it doth not veſt to have Treſpaſs before Entry: and he vouched the Caſe of Browning and Beſton, Plow. 136. where ſuch Leaſe after ſuch Condition broken, is merely void and diſſolved. And he ſaid, That it was the Opinion of the Juſtices of the Common Pleas, now late,

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That by a Releaſe to ſuch Leſſee, after the condition broken, nihil operatur; for after the Condition broken he is but Tenant at ſufferance; and a Leaſe for years, being but a Cattel, may begin without ceremony, and end without ceremony: 2 H. 7. 8. If the King make a Leaſe for years, with clauſe of Re-entry for not payment of the Rent, although the Rent be behind, yet the King ſhall not re-enter before Office found; and there ought to be a Seiſure, for the Leaſe is not void by the non-payment of the Rent, but onely voidable: but if the Leaſe be void for not payment, as it is our caſe it is, to what purpoſe ſhall an Office be? for by the mere contract the Leaſe ceaſeth, without re-entry, or without Office: But admit that the Leaſe ſhall not ceaſe without Office, and before Office the Queen grants the Reverſion over, yet an Office found after the Grant ſhall avoid the Leaſe as well as if it had been found before the Grant. A Leaſe is made upon condition, that if the Leſſor build a houſe upon the Land leaſed, and pay to the Leſſee 20l. that then the Leaſe ſhall be void; the Leſſor builds the houſe, and afterwards grants the Reverſion, the Grantee pays the 20l. now the Leaſe is void, although the Condition be partly performed in the time of the Leſſor, and partly in the time of the Grantee. So here, although the Grant of the Queen be Meſn between the non-payment of the Rent, and the Office; for the Queen is not entitled by the Office to the Land, but by the Condition broken, and the Office is onely to inform the Queen of her Title; and when the Office is once found, it ſhall relate unto the time of the Condition broken, and ſhall be of ſuch force as if then it had been found: and here in our caſe an Office was neceſſary for to entitle the Queen to the mean profits due betwixt the Rent arrear, and the Grant of the Queen, with which the Queen by her Grant hath not diſpenſed; and without Office he could not have them; for the arrearages of the Rent do not paſs to the Patentee, no more than if the Queen be ſeiſed of an Advowſon, and the Church become void, if the Queen Grant the Advowſon unto another, the avoidance ſhall not paſs. The King ſeiſed of a Rent which is arrear, grants the ſaid Rent, the arrearages ſhall not paſs: So here of the mean profits, for they are flowers ſain from the ſtalk, &c. H. 3. H. 7. f. 3. Cro. 221.

Godfrey contrary; and he ſaid, That the Leaſe is in being not impeached by the Condition, or the Office: and he ſaid, That notwithſtanding that the words of the Leaſe are, That the Leaſe ſhall be void, yet before that an Office be found, the Leaſe ſhall not be avoided: In all caſes where the Queen is entitled to any thing, or to defeat the Eſtate of another, an Office is neceſſary; and that ground is taken in the caſe of the Lord Berkley, Plow. Com. 229. by Brown, therefore here, it ought to be found by Office: See alſo the caſe of the Biſhop of Chicheſter, Fitz. Abridg. Forfeiture 18. 46 E. 3. The Biſhop leaſed for life certain Lands given by the Progenitors of the King, as parcel of the Barony of the Biſhoprick, rendring 30l Rent; and afterwards, by aſſent of the Dean and Chapter, releaſed a great part of the ſaid Rent; the Leaſe and the Rent ought to be found by Office. So an Alienation in Mortmain ought to be found by Office, becauſe the intereſt of another is to be defeated: So where the King's Tenant ceaſeth, &c. the Villein of the King purchaſeth Lands, or but a Leaſe for years: So where the King is but to have annum, diem & vaſtum. Waſte committed by the Commyttee of the King: Leſſee of the King for years makes a Feoffment in Fee; in all theſe caſes the King, without Office, ſhall not be entitled. The ſame Law is in caſe of a Condition broken; which ſee 2 H. 7. 8. Plow. 213. Frowick in his Reading puts this caſe: A Subject leaſeth for years upon condition, which is afterwards broken, and afterwards the Leſſor becomes King, here needs no Office, for at the time of the breach of the Condition the Leſſor was not King. The Caſe betwixt Sir Martin Forbiſher and one Bunny was, that the Queen made a Leaſe of Forbiſher and Bunny's Caſe.

of Dutchy Land upon Condition, which was broken: It was holden, that here there needs not any Office, for the Queen had those Lands severed from the Crown by Parliament, and they passed by the Dutchy Seal by Livery, and attornment of the Tenants: The Queen leaseth for years, Proviso, that the Lessee shall not alien; such alienation against such a Condition ought to be found by Office: and therefore at this day, where a Forfeiture is given to the King, &c. by Statute, the words are, That the King shall be seised without Office: And as to the Relation of an Office, he said, That an Office may have a Relation as to mean profits, but not as to vest the interest from the time of the Title accrued. And although that in the Grant of the Queen to Sir Thomas Henage there be these words, Non obstante, the not finding any Office, yet in this case an Office is necessary, for the Queen cannot dispense with the Law, so to alter or change the Law, as to make Lands in Borough-English descendable at the common Law: So if the King make a Lease for years, with clause of re-entry, and afterwards grants the Reversion over to a Subject; and farther grants, that if the Rent be behind, that the Lessor may re-enter without demand; yet the Grantee ought to demand the Rent. And, as our case is here, there needs not any Office to entitle the Queen to the Mean profits; for although that the Rent was not paid at the day, yet it was paid after, and all Rent due afterwards, and Acquittances given for the same; which matter we have specially pleaded to the intent aforesaid, upon which the other side have demurred, and thereby have confessed it, &c. But this Office doth not give any interest to the Queen in the thing leased, for she hath granted them over before, by which she hath disabled her self to take advantage of the Condition aforesaid, for she hath surceased her time: 18 H. 5. Traverse 47. Tenant for life forfeits his Estate, and before the King seiseth, The Tenant for life dieth, he in the Reversion may enter, and the King shall not seise, for the King hath surceased his time. And if the Queen should have advantage of this Condition, she should avoid her own Grant, which should be a great inconvenience: The Queen leaseth for years, Proviso, that the Lessee shall not do Waste; the Queen grants over the Reversion after Waste done, Office is found, the Queen gains nothing by it. It was agreed in the Case betwixt Knight and Beech, 28 Eliz. That the Grant of the Queen Mein between the award of the Commission, and the Return of it was good; for the Title of the Queen appeareth of Record, although that the Commission was not returned before the Grant made: And if an Office should relate unto the time of the Condition broken, it should be in vain to argue that point: for in the said case it was holden a Record, when the Jurors had put their Seals to it, before that it be enrolled: The acceptance of the Rent, and the Acquittances thereof are pleaded, 1. To prove, that there is no cause to find an Office in this case, for the Queen is answered the Mean profits: 2. To prove, that the Queen hath waved and refused to take the benefit of the Condition, but not to conclude the Queen, and then you cannot force her to take the benefit of the Condition: As the King, Lord, and Tenant, the Tenant dieth, his Heir within age, the King accepteth of the Services of the Heir, and afterwards grants over the Seignory, after Office is found, the King shall not have the Wardship, &c.

At another day it was argued by Popham, Attorny General, for the Plaintiff; and he said, That upon not payment of the Rent, the Lease is ipso facto void, without any Office found thereof, and that by reason of these words, [shall not be void;] for he said, it is not a Condition, but rather a limitation: As if the King make a Lease to three for eighty years, si tam diu vixerint, one of them dieth, the Lease is determined without Office: So a Lease made by the

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Queen for years, so long as the Lessee shall pay the Rent reserved, or so long as the Lessee shall there inhabit: In these cases, upon a Lease made by a common person, the Lessor before Entry might grant over, and the Grantee shall have advantage of it, for it is a limitation, and by the limitation the Lease is determined before the Grant; contrary, if it had been by words of re-entry. A Lease for sixty years, Proviso, that if the Lessee shall die within the term, that the Lease shall cease; the Lessor grants the Reversion over, the Grantee shall take advantage thereof by the common Law: See the Case 11 H. 7. 17. it is a limitation, and not a Condition. And he said, in this case an Office is necessary, not to avoid the Lease, for that was void before; nor to punish the Lessee as a Trespassor, or to fine him for the continuance of his wrongfull possession; but to make him responsable as an Accountant. In the Lease of a common person, where the clause is, That the Lease shall cease; If after the Rent behind, the Lessee continueth his possession, yet the Lessor shall not punish the Lessee as a Trespassor before his Entry, for the Lessee by his continuance is but Tenant at sufferance, for his first Entry was lawfull; And he agreed the Books, 14 H. 8. and 2 H. 7. That such advantages that a common person cannot have without Entry, the Queen cannot have without Office: But a common person before Entry cannot punish another by way of Trespass, therefore neither the Queen, without Office, shall punish one as an Intruder: And as to the Case, now lately adjudged betwixt Knight and Beech, the same doth not extend to our Case; for there an Office was requisite before the Grant of the Queen, because the per-close of the Condition was, That the Prior should re-enter: and it is very clear, That Chattels vest in the Queen without Office. And in this Case an Office is necessary for two purposes: 1. To make the Grant good: 2. To make the Occupier accountable for the Mean profits, and to give recompence, which the Queen is not enabled unto without Office. And here the Patentee shall have advantage of the cesser of this Lease: For, 1. He hath the Inheritance lawfully: and 2. The Lease is determined. If there were no Non obstante in the Letters Patents, the said Lease ought to have been recited, if it had not been determined; and if it be determined (as this case is) it ought to be recited, if there were not a Non obstante; for non constat to the Queen, if it be determined or not: And he said, That Leases which are of Record, are to be recited in Patents of the King, but not those which are not of Record, for Leases on Record may be easily found, but contrary of Leases in Fait: but in our case all is helped by the Non obstante; for the words of the Letters Patents are, Non obstante, That no office be thereof found, misrecital or non-recital of the former Leases, &c. It hath been objected, That because that the Law of the Land is, That in Grants of the King, all former Estates ought to be recited, the Non obstante of the Queen shall not help it: To that he said, That where the Law makes for the Queen, there the Queen for a particular respect may dispense with the Law. If the Queen be deceived by the not recital, that makes the Letters Patents naught; but if the Queen be not deceived by the not recital, the same shall not hurt. And it is clear, That the Queen may dispense with a Statute Law, although perhaps not with the common Law; The Queen grants upon suggestion, if the suggestion be false, the Patent is void, because the Queen is deceived in her Grant: and if the suggestion rest in Articles, and some of the Articles be false, the Patent for that is void: but if in the Patent such clause be, That be the suggestion true or false, the Patent shall be good: If the King seised of a Manor, to which an Advowson is appendant, grant the Manor, cum pertinentiis, the Advowson shall not pass: But if the Grant be in tam amplis modo & forma, &c. prout ipse Rex tenuit, the Advowson shall pass. And he said,

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said, That the Office here is not necessary to determine the Lease, but to enable the Queen to punish the Lessee for the continuance of his possession: And if the conclusion of the Condition had been by way of re-entry for non-payment of the Rent, and after the Rent is behind, and afterwards the Queen accepts the Rent due after, the Queen is not bounden by that, but upon an Office found she shall avoid the Lease.

Drew, Serjeant, contrary; and he said, That here is a condition, but not a limitation; for here is the natural word of a Condition, (scil.) Proviso. Some Cases put by Popham are Conditions, and not limitations: As a Lease for years, Proviso, that if the Lessee die within the term, that then the Lease shall be void, the same is a Condition: And in many Cases many words (less apt than these in our Case) shall make a Condition: As a Feoffment, dummodo solvat, &c. And he said, That without an Office the Lease is not void: See 35 H. 6. 57. The King giveth to Religious use certain Lands, ad effectum, to find a certain number of Monks, to hold in Frankalmoign: the King in that case cannot have Cessavit, for the Services are not certain; but if it be found by Office, that they have not their number, or do not make their Prayers, the King shall cease; by Br. Tit. Offic. 4. And he said, that this was often done in the time of King Henry the eighth; Lands given, Habend. pro erectione Collegii Cardinalis Eborum, &c. Where the King is to have Lands but as a pledge, as for an Alienation without licence, Office ought to be found of such Alienation: So of a Feoffment made to an Alien; otherwise it is in case of necessity, because the Freehold cannot be in abeyance: Tenant of the King is attainted of Treason before 33 H. 8. the King shall have the Land in point of common Escheat until Office be found, and afterwards by force of the Attainder. So if the Tenant of a Subject be attainted of Treason before Office found, the Land shall be in the Lord, but after Office it shall be in the King: 7 H. 4. If the King's Tenant dieth, his Heir within age, the King may seise the Body, and grant it over without Office, but not the Lands: See for the same 5 E. 6. Br. Office 55. in the Case of Charles Brandon, 35 E. 3. Villainage 22. The Villein of the King purchaseth Goods and Chattels, the property of them is in the King before Office or seisure, but in the case of lands he ought to seise: If this had been the case of a common person, the Lease should not be avoided without demand, therefore neither in the Case of the King without Office: For as the Lease it self was made by matter of Record, so it ought to be avoided by matter of Record, otherwise it shall not be taken void in Law, notwithstanding that the words are, That the lease shall be void. By the Statute of 11 H. 7. Alienations and Discontinuances by Women are made void, the same ought not to be holden altogether void as betwixt such Women and the Alienee, but onely betwixt the Woman and the Heir, the Statute of 1 Eliz. enacts, That all Leases made by a Bishop above the term of twenty one years, shall be void; the same shall not be construed to be void, but onely as to the Successor, for it shall bind the Lessor himself, as it was adjudged 5 Eliz. in the Case of the Bishop of Bath. As unto the Office here in our case, the same shall not enure to avoid the Lease, but onely to enable the Queen to punish the party for the Mean profits after the breaking of the Condition: But in our case, nothing is due to the Queen for the Mean profits, for we have shewed the payment of all the Rents, and the Arrearages thereof, after the breach of the Condition, and before the Grant of the King; and therefore this Office, being for no use, shall be void, unless it had been found, that the Land was of more yearly value than the Rent, &c. As in the case of common experience of Chantries, the Lands shall not be intended to be of greater value than the Rent to be paid out of it, if not that it

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be found by Office: When the Queen hath after received the Rent, and granted over the Reversion, now the Forfeiture is purged, not by way of conclusion, but it amounts to as much as if the Queen had said, That she would not take benefit of it: 4 H. 6. Champernoun's Case: The King, by taking in Ward of the Heir of the Donee, hath waved the Heir of the Donor: See Plow. in the Lord Barkley's Case, 3 Eliz. 237. and F. N. B. 143. And here in our Case, when the Queen grants over the Reversion, here the whole use of an Office is gone; for no Office shall be found for the benefit of a Subject: and as to the Queen, no benefit shall accrue unto her by such Office, for if she by such Office shall be entituled to the possession, she should avoid her own Grant of the Reversion; for she ought to have as great an Estate by the breach of the Condition, as she had at the time of the Condition: And in this Case the Office comes too late for the Queen, &c. as in the Lord Lovel's Case, Plow. 18 Eliz. 482. A Lease for years is made unto an Alien, upon condition, that if the Alien pay such a sum of Money to the Lessor at any time during the Lease, that he shall have Fee; the Alien is made a Denizen, the Money is paid, and all that is found by Office: The Queen shall not have the Fee, for at the time of the vesting of the Fee the Lessee was Denizen; and the Office shall not relate to the time when the Fee vests, and no farther, but to avoid incumbrances: and so in such Case the Office comes too late. And if the King's Villain purchaseth Lands, and the King make him free, and afterwards Office is found, the same shall not entitle the King, but the Villain manumitted shall hold the Land: So in our Case, the Queen after this Grant shall not take the benefit of this Office, or breach of the Condition found by it.

And afterwards, Manwood, chief Baron, gave order, That those who do argue after, shall speak but to two points:

1. Where the Queen Leases for years, rendring Rent payable at the Receipt at West. in which Lease there is a Proviso, That if the Rent be behind, the Lease shall be void, If now the Rent not being paid, the Lease shall be void without any Office?

2. To what effect an Office now shall be, being found after the Queen hath granted the Inheritance over.

At another day, Owen, Serjeant, argued to the contrary; and he said, the Lease is void without any Office: for as a Lease for years may be made by contract, so it may be avoided by words of contract, otherwise it is of Freehold; So that a Lease shall be avoided without entry, 6 E. 6. 137, 138. Plow. Browning and Beston's Case; Offices are of two sorts: First, entituling the Queen, as purchase of an Alien, purchase of Villain, alienation in Mortmain; and Offices informing the Queen, where she hath interest in the Land before, as in our Case here: Admit that the Office was necessary to find the breach of the Condition; the Patentee shall take the benefit of it: for being found by Office, that the Queen hath made such a Lease with condition to be void for non-payment of Rent, and that at such a day the Rent was behind, now, being of Record, every Subject shall take advantage of it: As where a Husband makes a Feoffment in Fee upon condition, of the Land of his Wife, and dieth; If the Heir enter for the Condition broken, now may the Wife enter upon him; for now the discontinuance is avoided: See 11 H. 7. 17. Where the Grantee of the Reversion shall take advantage of a condition, ut supra, concluding, That the Lease shall be void: And see 136. Plowd. Browning and Beston's Case. And although after the default of payment, the Rent due afterwards was accepted, yet that shall not conclude the Queen; for this acceptance is not under the great Seal, but onely done by the Office: Also the Lease being void, for the non-payment, cannot be made good by acceptance afterwards.

Atkinſon, contrary, Although that the Leaſe be void, de facto, yet until it appeareth to the Court, the Court cannot ſay it is void, or not void: therefore Office is neceſſary to aſcertain the Court: The Queen is a body Politick, and the chief body Politick above others, becauſe ſhe is the Maker, Authour and Creatour of all other Corporations; and that is the reaſon, that the King cannot ſpeak without writing; and this is the moſt ſolemn writing: i. Writing of Record; So ſhe cannot take but by Record: And in our Caſe, it doth not appear by any writing of Record, the Rent was behind; and it is agreeable to the Majeſty of a King to do nothing without matter of Record; which ſee 4 Eliz. in the caſe of the Dutchy: And he ſaid there is no difference betwixt the Caſe in 2 H. 7. and our Caſe: In each Caſe it is a Leaſe for years, Rent reſerved, in this onely differing, that there is a clauſe of re-entry; and here the concluſion of the Condition is that the Leaſe ſhall be void; but in both Caſes, none can ſay that the Rent is behind, untill it be found by Office, therefore none can ſay, that the Leaſe is void, untill Office found: See by Thorp, 35 E. 3. Chattels perſonals of the King's Villains, are in the King without office, for ſuch things may be loſt or worn, contrary of Chattels Reals, as a Leaſe for years; for Land cannot but continue: and ſuch things which may be in the King without writing, he may grant without writing, as a chain of Gold, or a Horſe, Deodands, Felons goods, Wreck, &c. veſt without Office, becauſe Chattels perſonals: See 20 E. 4. 11. contrary, when they are Chattels reals, and permanent; for there an Office is neceſſary: In the Caſe of year, day and waſte, an Office ought to be found, Ergo, à multo fortiori, in caſe of a Leaſe for years, which is a greater intereſt, &c. 49 E. 3. 11. There is a general Rule, Quo modo quodque ligatur, eo modo diſſolvitur: That which paſſeth by Livery ought to be reduced by re-entry, that which begins by Record, ought to be determined by Record; and here in our Caſe, the Land cannot depart from the King without Record, therefore it ſhall not revert without Record; although that the breach of the condition be but matter of fact, yet the proof of that ought to be of Record: And here in our Caſe, is a condition, and not a limitation. And he ſaid, that in the Caſe often cited before of 11 H. 7. 17. it is a limitation, and not a condition; For if it were a condition, the Grantee by the Law could not take advantage of it, becauſe not privy: and he was clear of opinion, that where the words are, That the Leaſe ſhall ceaſe, or ſhall be void; yet in ſuch caſes there ought to be an Office, for in Leaſes of the King there needs no re-entry, becauſe the King (to ſpeak properly) cannot re-enter. And the words, [That the Leaſe ſhall be void] do amount to words of re-entry, and he ſaid, That in the Caſe of a common perſon upon ſuch a condition broken, the Land ſhall not be in the Leſſor, without re-entry, no more ſhall they be here in the Caſe of the Queen without an Office: Alſo the Rent reſerved upon this Leaſe was behind, and the Leſſee continuing the poſſeſſion, the Queen by acceptance of the Rent, hath affirmed the party Tenant, and afterwards granted the Reverſion over before any Office found of that matter; Now the Leſſee is diſcharged, and ſhall never be impeached for the ſaid Rent behind; and the Grant, Ex certa ſcientia, &c. after found, ſhall not defeat this Grant by any relation. And the Queen by her Grant hath included all the advantage which accrued unto her by the breach of the Condition, and as to that which hath been objected, That in the Letters Patents there are theſe words, Notwithſtanding the not finding of any Office, &c. truly the ſame makes the matter more clear for us; for by theſe words, it is apparent, that the Queen would not have an Office found; & if ſo, then the Land paſſeth as in Reverſion, and the Queen may diſpenſe with a thing concerning her ſelf: as of late it was adjudged in the Caſe of one Michel. The Queen makes a Leaſe for years, rendring Rent, Si petatur, It was holden in ſuch caſe, that the Rent in ſuch caſe,

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ought to be demanded by the Queen's Officer; and in such case the Queen may well enough dispense with her Prerogative; and here the Queen conceived, that she should not have an Office, nor have her Title found by it. Manwood, chief Baron, The Queen leaseth for years upon condition, That if the Lessee doth not marry within two years, that the Lease shall be void, whether here there ought to be an Office or not. Atkinson said, That here ought to be an Office.

At another day, It was argued again by Godfrey, This Lease is not void, Ipso facto, for the not payment of the Rent, which is but matter in fact: and as this Lease hath his beginning by matter of Record, so also his end shall be by matter of Record: In cases of a common person there ought to be a demand, therefore in case of the King an Office, as in the Case of a common person demand ought to be as well where the Condition is by way of re-entry, as that the Lease shall be void; therefore in both Cases, in the Case of the King there shall be an Office: and he said, That if the Lease and the Condition be in the Case of a common person, that the Lease shall be void, without any demand of that Rent, then there needs no demand; for demand is a part of Contract: and here, before Office found, the Lease is not merely void, for a Release unto the Lessee before Office, is good; and the Queen is not entituled to the profits before office found; It was argued by Coke to the contrary, The Lease is void without any demand, without any Office, for it is parcel of the Contract to be so void, and he said, That this Lease before Office is void in interest and property, but not in possession: Where a common person shall not have the Land without Action, the King shall not have it without Office, and Scire facias; as Cessavit, Wast. contra formam donationis, &c. and where a common person shall not have before Entry, the King shall not have before Office, for Office is in the place of Entry, Wardship, Mortmain. It is clear, in the Case of a common person, That if the Condition be, that the Lease shall be void without any demand, that there demand is not requisite, therefore not in the Case of the King: See Browning and Beston's Case, That such a Lease with such a Condition, after the Rent behind, cannot be made good: And it is a general rule, That where the certainty of the term appears by Record, and the King is to have but a Chattel in it, there the King upon matter in fait shall have it without Office; as the Temporalties of the Bishop upon his death, which is matter in fait: See F. N. B. 174. The Widow of the King marries her self without licence of the King, the King shall seize the Lands, and that without Office, and there the marriage is matter in fait: The King leaseth for years upon condition, that if the Lessee marry, that then the Lease shall be void, If the Lessee marry her self, the Lease is void without any Office; and if so, then every stranger in the world shall have advantage of it, as the Case is, 11 H. 7. as was the Case of Ralph Thomas; The Husband seised of Land in the right of his Wife, leaseth for years, and afterwards he and his Wife levied a Fine to a stranger, the Husband dieth, the Conusee shall avoid the Lease, because it was merely void by the death of the Husband: So of a Rent charge granted by the Husband, &c. But although this Lease be merely void, yet a Bill of Intrusion doth not lie against the Lessee before Office, for in such case, a common person shall not have Trespass before entry; but yet if the Lessee dieth after the Rent behind, ut supra, the Lease shall not be said Assets to the Executors, for the not payment of the Rent is a nullity of the Lease by the intent of the original Contract: And also the Lessee is not become Tenant at sufferance after the Condition broken, for Tenant at sufferance takes the profits to his own use; also none can be Tenant at sufferance to the Queen, for then he should have the profits of the Lands by Laches, which shall never be imputed to the Queen: Now it is to see, To what purpose this Office is? A common person makes a

Hob. 331. 3 Co.

Plowd. Com. 136.

Ralph Thomas's Case.

Lease

Lease upon condition, that if the Lessee alien part, and that be found by Verdict, that the Lease shall be void, the Lessee alieneth part, the Lessor grants the reversion over; after the alienation is found by Verdict, the Grantee shall have advantage of it; if the Case had been, That if the Rent be behind, and Office found of it, that the Lease should be void, the Rent is arrear, and the King grants the reversion, and afterwards Office is found, now the Lease shall be void against the Grantee: Also this Office shall have relation, and comes in as good time, as if it were found before the Grant; Tenant of the King alieneth in Mortmain, the King grants over the Seignory, Office is found; now by this Office, the King is entituled, not unto the Land, but unto the profits before the Office: And although the Queen hath granted the reversion over, yet she hath not granted inclusive the mean profits: A common person hath a Rent which is arrear, he grants the Rent, the arrearages do not pass: As where the King is seised of an Advowson which becomes void, and afterwards grants the advowson to another, the avoidance shall not pass thereby; and that was Giles's Case: See 16 H. 7. 7, 8. And in our Case, This Office doth not entitle the Grantee, for how can an Office entitle a common person? If the Lease were but voidable, perhaps, so long as the Lease should continue unavoided the Queen should not be answered the profits, contrary, where it is void. And a common person shall have advantage of it.

Giles's Case.

Egerton, Solicitor general, to the same intent; And he said, that this Lease is altogether void, in privity, property, right and term: In the Case of a common person, after the Rent behind, in such case the Lessee should be Tenant at sufferance, which cannot be in the King's Case; and if Tenant at sufferance, then no privity; for a Release by the Lessor to the Lessee cannot enure, and that for want of privity; Lit. 109. And such Lessee cannot attorn, and if the Lessor after that accepts of the Rent, the same doth not make the Lease good, and all for want of privity; therefore here is no privity: As to property, such a Lease shall not be said Assets in the hands of an Executor, nor shall be sold upon an Extent, nor forfeited by outlawry; And here in this Case, the Queen cannot be said to take any thing by the breach of the Condition, but hath her reversion discharged of the Lease; and he said, That the Office is found well enough for time, and it shall relate to the time when the title accrued, that is, when the Rent was behind, and the arrearages of the Rent do not pass by the grant of the Land, or the reversion: The Queen hath a Rent-charge out of Lands which is behind, the Lands come to the Queen, and she grants the same over, yet she shall charge the Lands with the said arrearages; but contrary, in case of an injury done upon the Land of the Queen: As the Tenant of the King aliens without licence, and afterwards the Lands so alienated came to the King's hands who grants them over; the Grantee, nor the Land shall be charged, but onely he who was party to the alienation, his Lands, and his Executors; So of an Intrusion: Tenant for life of the King makes a Feoffment in Fee, the King grants over the reversion, and afterwards the tortious Feoffment is found by Office; this Office is soon enough for time, and the Grantee of the reversion shall have advantage of it, and the King the mean profits from the time of the alienation: and afterward in Mich. Term, 33 Eliz. the Case was argued by the Barons.

Clark, Puisne Baron, The Lease is conditional, and with a limitation also; so conditional and limitation mixt together, 3 Ass. 10. Land given to one untill he come from foreign parts; Lands given to one so long as he shall continue sole, is an Estate for life with limitation upon her marriage; so during the coverture, &c. and these limitations are not collateral, but begin with the Estates, when the Estates are limited; but conditions always come when the Estate is settled, as it is in our Case,

Case; yet if the intent and substance of the Contract betwixt the King and the Subject be well considered, there shall not be any difference, &c. Lands devised to one, Proviso, That if the Devisee shall disturb the Executors of the Devisor, his Estate shall be void, and the land remain over, &c. the same is a good remainder, for it is a limitation conditional: See Scholastica's Case, Plowd. Com. 14 Eliz. 413. concerning an Estate tail with a limitation: And Fitz. James Case there put by Dyer: See Browning and Beston's Case before cited, and Martin Dockra's Case where a condition is conceived in words of Covenant, &c. Gent, Baron, argued to the same intent: Manwood, chief Baron, to the same intent. The Rents reserved upon the Leases of the Queen, are to be paid to Receivors, Baileys, or at the Receipt of the Exchequer: The Queen shall not make any demand of her rent, for she hath an infinite number of Farmors, and if demand be necessary, she were to send an army of Receivors, or Baileys to receive and demand her rents. If the Rent of the King be to be paid at the Exchequer, if the King's Farmor be there, and tender the rent at due time, and none be there to receive it, he hath saved his Lease, for he hath done his possible endeavor, although the words of the Condition in the Lease be behind and unpaid, yet not tendred, shall be understood: as in the common case of Mortgages and Obligations. But in all the Record before us, there is no words of any tender, therefore, according to the words of the condition, the Lease is meerly void, and determined in right, in privity, and in tenure; for so is the pleasure of the Prince expressed in her Letters Patents under the great Seal of England, That it shall be then void, and of no effect: Then, i. whensoever the Rent shall happen to be behind, and therefore as soon as the Rent was behind the Lease was determined: so that if after the non-payment a stranger had entred upon him, (scil.) the Lessee, upon which he brings Ejectione Firmæ, the Defendant might have pleaded the special matter against him, Judgment if Action: so as the Lease is void in Right: It is also void in Privity and Tenure; for a Release to such Lessee, after the Rent is behind, is altogether void, for he was not then Lessee, and so the privity is gone, and no acceptance can make such Lease good. And if such a Lessee after his Rent would surrender, and in consideration of such Surrender obtain a new Lease from the Queen, this new Lease is also void, for here upon the matter is no surrender: Also such a Lease is void in property, for if the Lessee in such case dieth, his interest, such as it is, shall not be accounted Assets in the hands of his Executor: upon the breach of this Condition for the Rent, although that the Lease be become void, yet the possession of the land is not reverted in the Queen without Office; and although the Office doth not make the Lease void, which was void before for non-payment of the Rent, yet before Office found the possession is not vested in the Queen; for before Office found we cannot award Process against such a Lessee for his continuing the possession after the Rent behind, and untill Office found the Lessee cannot be found an Intruder; and Tenant at Will he cannot be, for no other Will appears of the Queen, but that in the Letters Patents, and that is to have the Lease void, whensoever the Rent shall be behind, and that Estate is gone because the Rent is behind; Tenant at sufferance he cannot be in this case. In case of a common person, when Lessee for years holds over his term, he is become Tenant at sufferance, and such a Tenant shall not pay Rent, for it is the folly of his Lessor to suffer his Lessee at sufferance to continue possession of the Land after his term, so as every Tenancy at sufferance is made by the Laches of the Lessor, which Laches cannot be imputed to the Queen: therefore here, this Lessee, when the Condition is broken, is not a Tenant at sufferance, nor shall have the profits of the Lands to his own use, but the Law shall account him to be a Bailiff of his own wrong, and so be accountable

countable to the Queen, but no Intruder till Office be found: and that appears in our Books, 1 H. 7. 17. The King's Tenant dieth, his Heir within age, if any entreth into the Land of the Heir, he shall not be an Intruder untill Office found, but the Heir or a stranger who entreth before Office, and takes the profits, shall be brought by Process into the Exchequer to make their Accounts, and to answer the issues and profits; but if he intermeddle after Office, he shall be an Intruder. Tenant of the King alieneth without licence, by that the King is to have the profits, untill he compound with the King, and purchaseth his pardon; and if the Feoffee taketh the profits after the Alienation, he is a Pernor of the profits, and shall answer for them; but he is not an Intruder untill Office found. Tenant of the King is attainted of Felony, the King is entitled to the Land from the time of the Felony committed, yet if he take the profits untill Attainder, he is not an Intruder, but he taketh the profits without Title, therefore he is Bailiff of his own wrong, and so accountable to the King. And it is not a new thing, that a Conveyance or an Estate shall be void as to the Right onely, and not as unto the Possession. The Statute of Domf. West. 2. finis ipso jure sit nullus: i. as to the right of the Entail; yet, as unto the possession, the issue in tail is bound untill he hath recovered it by a Formedon: Upon the Statute of 21 H. 8. cap. 13. by acceptance of another Benefice against the said Statute, the first Benefice shall be void, &c. yet the same shall not be construed so as to possession, but that the same shall remain with him untill it be taken away from him: The Queen leaseth for years, Proviso, that if the Lessee commit Waste, the Lease shall be void; when first Waste is done the Lease is determined in Right, but not as to the possession before Office finding the Waste: So if the Condition be for the building of a House, for by the breach of the Condition, the Lease, as unto the right and interest, is determined, and after Office found it shall revest the possession also: And if a Lease of the King expire by effluction of time, and such effluction appeareth here of Record, if the Lessee in such case continueth his possession, he shall be an Intruder. Sir Robert Chester's Case, Dyer 4. Eliz. 211. Sir Robert Chester was Receivor of the King by Patent, upon condition to render Account yearly at such a day, and before such a day to pay the arrearages; the condition is broken, the Patent was void without Office thereof found, but yet it is not altogether void, for a Scire facias shall be brought against the Patentee. The King leaseth unto A. his Manor of D. and after he leaseth also to the said A. his Manor of S. Proviso, that if the Lessee doth not surrender his first Lease of the Manor of D. at such a day, that then the latter Lease of the Manor of S. shall be void: The Surrender is not made, now the Lessee, if he continue his possession in the Manor of S. after, he is an Intruder. Now is to see of what effect the Office is, not to make the Lease void, but to vest the possession in the King again: It hath been objected, That, as the case is, the Office is not to any purpose, for the Queen hath granted the inheritance over, so as the possession cannot be revested in the Queen by that Office against her own Grant, nor can the Queen punish the Lessee as an Intruder for his continuance of the possession after the Office, nor can seise the Land by such Office, and there is not any such Office for the benefit of a Subject, therefore the Office is meerly void. Let us compare our Case unto the Case of Cessavit; The Tenant of the King ceaseth for two years, the King grants the Seignory over in fee, the Cesser is found by Office, the Grantee of the Seignory gains nothing by it; but that is not like unto the Case in question, for there when the Office is found, the Tenant may tender the arrearages, for the King is not absolutely entitled by the Cesser, because by tender of the arrearages the Tenant may save his Tenancy: But in this case, after the Condition is once broken,

there

there is not any means for the Tenant to save the Forfeiture: also the King by his Grant, after the Cesser, hath not granted the thing which accrued unto him by the Cesser, (scil.) the Tenancy, but onely the Seignory: but in our case the King hath granted the thing forfeited, i the land demised: and here is a full forfeiture, contrary in the case of Cesser: And in our Case the King hath granted onely the land demised, and not the profits encurred mean between the breach of the Condition, and the Grant of the King, but these remain to the Queen, and to that purpose the Office is good, (scil.) to entitle the Queen to these profits. And as to that which hath been objected, That the Lessee hath always paid the Rent unto the Queen after the Condition broken, and hath an Acquittance of the Receipt of it, therefore no profits due to the Queen, for she hath the Rent in lieu of the profits; and it is not reason, that the Lessee shall pay an annual Rent, and also shall be accountable for the mean profits, and so the Office, as unto the mean profits (which in truth upon the matter aforesaid are not due unto the Queen) is void, and then altogether void, quia nihil operatur, To that he answered, That the King shall not be bound off the mean profits in that case by the payment of the said Rent, for by intendment the true annual value of the Land is more than the Rent reserved; and it is not reason but that the Queen shall be answered of the surplusage or overplus above the Rent, and therefore the Office entituling the Queen to part of the profits is good enough: Tenant of the King for life, or for years, makes a Feoffment in Fee, although that by this Act he cannot pluck any thing out of the King, yet because he hath attempted to do such a wrong, it is a forfeiture, and the Lease for years utterly extinct by it; for it cannot be in the Feoffor against his own act, by which he hath departed with all his Interest, &c. And the Feoffee cannot have it, for if he hath any thing, it ought to be a Fee-simple, or nothing at all; and a Fee-simple he cannot have, for that remains in the King, and so neither have Estate, then is all in the King, and the King hath Title to have the profits, &c. But put case, that after the Feoffment the King grant over the Land in Fee, and after that tortious Feoffment is found by Office, he who occupieth the Land after the forfeiture, untill Office be found, shall be accountable to the King for the issues and profits, &c. as Perner of the profits, or Baily of his own wrong, and he who occupieth the Land after the Office shall be punished as an Intruder. There was a Case very late in this Court betwixt Sir Tho. Henage and one Hungate, which was thus; the Queen leased for years unto Hungate, provided that he should not do Waste; Waste is done, the Queen granted the Reversion to Sir Tho. Henage, Office is found, the Grantee entred, and his entry was adjudged lawfull, and that the Queen should have the mean profits from the time of the Waste done untill the time of the Grant. Some say, that that case was not adjudged, but compounded: And he vouched Sir Walter Mildmay's Case: The Lord Sturton held Lands of the Queen in Knights-service, and was attainted of Felony, by which the Lands escheated to the Queen, who granted those Lands; and it was holden, that the Queen should have the mean profits betwixt the time of the Felony committed, and the Grant. And after in the principal Case Judgment was given for the Plaintiff, (scil.) the Patentee of the Queen against the Lessee; who cast in a Writ of Error, and by his Council prayed, That the Writ of Error be not broken open untill the Judgment be entred. Manwood, The Judgment hath reference and relation unto the first day of this Term, and therefore do not doubt of that.

Sir Tho. Henage & Hungate's Case.

Sir Walter Mildmay's Case.

*Mich.* 32 *Eliz.* In the Exchequer.

## CLXXIX. Sted's *Case.*

3 Len. 259. STed, of Great Melton in the County of Oxford, was assessed to 7 s. for Fifteens, and upon refusal to pay it, the Collectors distrained the Beasts of Sted, and sold them: Sted brought Trespass thereupon in the King's-Bench; and the Collector exhibited his Bill into this Court against Sted, who shewed by his Council, That the Statute of 29 Eliz. which enacted this Fifteen, provideth, That the said Fifteen shall be levyed of the movable Goods and Chattels, and other things usual to such Fifteens and Tenths, to be contributary and chargeable; and shewed farther, that the Cattel distrained were tempore districtionis upon the Gleab Land of a Parsonage presentative, which he had in Lease, which Gleab Land is not chargeable usually to Fifteens granted by the Temporalty, nor the Chattels upon it. But it was the Opinion of the whole Court, Although that the Parson himself payeth Tenths to the King, yet the Lay-Farmor shall pay Fifteens, and his Cattel are distrainable for it, even upon the Gleab Land of the Parsonage; and therefore it was adjudged, that in the principal Case the Distress and Sale were good and lawfull.

*Mich.* 32 *Eliz.* In the Exchequer.

## CLXXX. *The* Dean *and* Chapter *of* Winsors *Case.*

3 Len. 258. IN this Case it was moved, If one hath a Rectory impropriate, and by the Statute of 26 H. 8. cap. 3. is to pay an annual Rent for the same in the name of a Tenth, and by that is discharged of Tenths and first fruits; If he shall have the Privilege of the Exchequer? for he is to pay the same sum yearly: And the Barons were of Opinion, that he should not; for so every one, who is to pay any Tenths or first fruits, should draw another who sueth him into the Exchequer, and so all Controversies concerning Tithes and Parsonages should be drawn hither, which should be a great prejudice to the Spiritual Courts. But Egerton, Solicitor, vouched a Case, (scil.) Conier's Case, where the King gave a Parsonage to a Priory in Frankalmoign, and the Tithes thereof being withdrawn, the Prior impleaded him who withdrew his Tithes in the Exchequer; and in that Case it was holden, that the Prior should have the Privilege, for the King is in danger to lose his Patronage, or rather his Foundership, if the Rectory be evicted. Gent, Baron, The Tenant of the King in chief, or he who pays first fruits, or he who holds of the Queen in Fee-Farm, shall not have in such respect the Privilege here. Quære.

Conier's Case

*Mich.* 30 *Eliz.* In the Common Pleas.

## CLXXXI. Cony *and* Beveridge's *Case.*

3 Len. 216. IN Debt upon a Bond, the Case was, That the Plaintiff leased unto the Defendant certain Lands lying in the County of Cambridge, rendring Rent; and afterwards the Defendant became bounden to the Plaintiff in a Bond for payment of the said Rent: upon which Bond the Plaintiff brought an Action of Debt in the County of North-

Northampton, to which the Defendant pleaded payment of the Rent, without ſhewing the place of payment: and upon payment they were at iſſue, and found for the Plaintiff by Niſi prius in the County of Northampton: In Arreſt of Judgment it was moved, that the iſſue was miſ-tryed; for here the payment of the Rent being pleaded, without ſhewing the place of payment, it ſhall be intended that the Rent was paid upon the Land, which is in the County of Cambridge: See 44 E. 3. 42. Anderſon was of opinion, that no Judgment ſhould be given for the cauſe aforeſaid: Rhodes and Windham contrary; for it doth not appear that the iſſue is miſ-tried, becauſe that no place of payment is pleaded; and it might be, for any thing is ſhewed, that the Rent was paid in the County of Northampton.

*Trin.* 30 *Eliz.* In the King's-Bench.

## CLXXXII. Berry *and* Goodman's *Caſe*.

IN an Ejectione Firmæ, upon a ſpecial Verdict, the point was, One intruded upon the poſſeſſion of the Queen into Lands in Kiſgrave in Suffolk; and during this Intruſion, the Queen granted theſe Lands to A. B. by her Letters Patents; and the Patentee, before any Entry made in the ſaid Land, granted the ſame over. Some held, that the Grant was good, for the Intruder had gained nothing againſt the Queen, and by the Grant of the Queen, and the aſſignment over, nothing accrued to him: and where a man hath poſſeſſion of Lands, his continuance therein cannot gain to him any intereſt, or increaſe his Eſtate, without ſome other act done of later time. If the Guardian do continue in poſſeſſion after the full age of the Heir, he is not a Diſſeiſor, nor hath any greater Eſtate in the Lands: and upon the Book of 21 E. 3. 2. this Caſe was collected; The Tenant of the King dieth, his Heir within age, a ſtranger intrudes, the Heir at full age ſueth his Livery out of the King's hands, the Intruder dieth in poſſeſſion; the ſame deſcent ſhall not take away Entry. Ow. 95, 96.

Coke contrary, The Intruder cannot be Tenant at ſufferance, for at firſt he enters by wrong, and none can be Tenant at ſufferance but he who comes in by Title: And it is clear, That the Intruder by his firſt Entry doth not gain any Eſtate in poſſeſſion, upon which he can have an Action of Treſpaſs, but after the Grant of the Queen he hath preſently Fee by wrong: 8 H. 4. 129. A ſtranger enters upon the King to which he hath right in the right of the Ward, yet the Freehold doth remain in the Heir. And he ſaid, that if A. levyeth a Fine to B. ſur Conuſans de droit, &c. now the Conuſee hath poſſeſſion in Law, but not in fact; and if before the entry of the Conuſee W. entreth, and dieth ſeiſed, he hath no remedy, for he had not poſſeſſion in fact, ſo as he might have an Aſſiſe, or an Action of Treſpaſs: So the Law is now taken; A. deviſeth his Lands to B. and dieth, and a ſtranger entreth and dieth ſeiſed before any Entry by the Deviſee, now is the Deviſee without remedy: And here in our Caſe, the Intruder hath not gained any poſſeſſion in the Lands by his intruſion, no more than if the King gives Lands to one in Fee, and before the Patentee enters, a ſtranger enters, now cannot the Patentee grant it over, if he doth not reduce the Eſtate by Entry: See Dyer 9 and 10 Eliz. 266. The Queen ſeiſed of the Manor of Beverley, a ſtranger erected a Shop in a vacant plat of the Manor, and afterwards took the profits of it, without paying any Rent for the ſame to the Queen, and afterwards the Queen granted the Manor to the Earl of Leiceſter, and he never entred into the ſaid Shop, nor took any Rent for the ſame, and afterwards the Occupier of the Antea 210. 1 Cro. 920. Ow. 95. P. 20 Eliz. in Curia Ward. Garbery's Caſe. acc.

Shop, died in poſſeſſion, and his Son and heir entred; and the better opinion was, that the ſame was not a deſcent againſt the Patentee, becauſe at the firſt it was not a diſſeiſin againſt the Queen: Another Queſtion was moved, as to a path-way then in queſtion: And the Jury found that one ſide of the path-way was the Land of the Parſon of the Church, and the other ſide the Church-yard, and prayed the opinion of the Court therein, to whom the intereſt of the path-way did belong; to which it was ſaid by the Court, That that ought to be found by the Verdict, For although that both be the Freehold of the Parſon, yet the ſoil of the path-way might be conveyed by an expreſs Grant unto another. But the Court ſeemed to incline, that the ſoil of the path-way did belong to him who had the Lands on both ſides, and that is the Caſe, as well of a high-way as of a path-way; And it is alſo good Evidence to prove ſuch matter, Who hath uſed to cut down the Trees, or to cleanſe the way.

24 *Eliz.* In the Court of Wards.

## CLXXXIII. Wiſeman's *Caſe.*

6 Co. Weeden & Baldwin's Caſe.

IN the Court of Wards, before the Lord Treaſurer, Maſter of the Wards, Wray, chief Juſtice, Anderſon and Periam Aſſiſtants to him; the Caſe was, That Wiſeman was ſeiſed of certain Lands holden by Knight's-ſervice in Capite, had iſſue by a former Wife who died; and made a Feoffment in Fee to the uſe, of her who ſhould be his Wife, for life, and afterwards to the uſe of himſelf and of his iſſue of the body of ſuch Wife to be begotten, the remainder over; Wiſeman took a Wife, and had iſſue, and died; If now, living the Wife, the iſſue ſhall be in Ward, was the queſtion? It was argued by Coke, That he ſhall not be in Ward: And firſt, it was agreed of both ſides, and alſo by the Juſtices, That it was a remainder and not a reverſion; and that at the Common Law, the deſcent of a remainder, during the Eſtate for life, doth not entitle the King unto Wardſhip; and there we are to ſee, if upon the Statute of 32 H. 8. the laſt branch of it; where two or more perſons hold any Lands of the King by Knights-ſervice, jointly to them and the heirs of one of them, and he that hath the Inheritance thereof dieth, his heir being within age, in every ſuch Caſe, the King ſhall have the Ward, and marriage of the body of ſuch heir, ſo being within age, the life of the Freeholder, or Freeholders of ſuch Lands notwithſtanding: See 33 H. 6. 14. That the father, to prevent Wardſhip, may alien, and take to him and his ſon, and the heirs of the father, which miſchief was intended to be remedied by the ſaid Statute: But theſe words ſhall not in conſtruction thereof extend farther than the words eſpecially, becauſe they croſs the Common Law, and go to charge the Inheritance of others; and therefore they ſhall be taken ſtrictly, and not by equity: as the Statute of Weſt. 2. cap. 40. Cum quis alienat jus uxoris ſuæ, concordat. eſt, Quod de cetero ſecta mulieris aut ejus hæredis non differatur propter minorem ætatem hæredis, qui warrantizare debuit, that Statute is taken ſtrictly; for if the Vouchee voucheth over, the ſecond Vouchee ſhall have his age, Quod vide 18 E. 4. 16. Alſo the Stat. of Weſt. 1. enacts, That where the Diſſeiſor dieth ſeiſed, the Diſſeiſee ſhall have his Writ upon the Diſſeiſin againſt the heir of the Diſſeiſor of what age ſoever he be: So the heirs of the Diſſeiſee, yet it is holden, 9 E. 3. If the Diſſeiſor leaſeth for life, and dieth, and the Leſſee be impleaded, and makes default after default, upon which the heir of the Diſſeiſor prayeth to be received, being within age, he ſhall have his age, notwithſtanding the ſaid Statute, which ſhall be taken ſtrictly, becauſe it controlls the Common Law, and chargeth the Inheritance of the Subject: So

upon

upon the Statute of Weſt. 1. cap. 39. That none ſhall vouch out of the line upon that Statute, although the Tenant to the Action againſt whom the Præcipe is brought, is bound by the Statute, yet Tenant by receit is at large, and he may vouch at the Common Law: 2 H. 7. 2. 16 H. 7. 1. for theſe Statutes go in abridgment of the Common Law, and therefore ſhall be taken ſtrictly: Now, according to this Statute, it is of the ſame nature as the other before remembred, and therefore ſhall not be extended in conſtruction beyond the Letter. As Sir Rowland Hill's Caſe, Grandfather, father and ſon, the grandfather ſeiſed of Land, ut ſupra, makes a Feoffment in Fee to the uſe of himſelf for life, and afterwards to the uſe of the ſon in Fee, The grandfather dieth, the father dieth, the ſon ſhall not be in Ward, Caſus qua ſupra, For this Statute ſhall not be conſtrued by equity, and by it the words thereof, [Preferment of children] ſhall not extend unto the childrens children, but to the children onely of the King's Tenant, who makes the Conveyance: And the words in this Statute [or otherwiſe] ſhall not be intended to other perſons then are remembred in the Statute. There was a Caſe late, where the Statute was conſtrued in ſuch a manner, Quod vide 18 Eliz. 345. Thornton's Caſe; A Lady, ſeiſed of Lands in chief, made Conveyance of her Lands, for the advancement of her baſtard-daughter, the ſame Conveyance is not within the Statute: See alſo the Lord Powes's Caſe, 14 Eliz. Dyer 313. So in the Caſe of Sir Hugh Calverley, the Law was taken, That where the husband dieth ſeiſed in the right of his Wife, and they levy a Fine unto the uſe of the husband and Wife, for the advancement of the husband; ſuch Conveyance and diſpoſition is not within the Statute of 32 H. 8. Popham, contrary, And as to the Caſe of making this Statute, it was not to overthrow a foundation, as it hath been ſaid; but it was rather a gratuity of the Subjects to the King for his bounty towards them; for whereas by the Statute of Uſes, Uſes were executed in poſſeſſion, ſo as the Subjects could not diſpoſe of their Lands, by their Wills, as before the Uſes: Now, by this Statute, the King was pleaſed to give his Royal aſſent to an Act, by which Lands might become deviſable, in reſpect of which, the Subjects added to this Act, the laſt clauſe, to give him Wardſhip, where it did not lie before by the Common Law, and that as a recompence from the Subjects for the King's bounty, and therefore it ought to be conſtrued beneficially for the King. And to prevent covin and fraud, was not the ſcope of this Statute; For if three purchaſe Lands unto them, and to the heirs of two of them; now it is uncertain whoſe heirs ſhall inherit, for non conſtat, which of them ſhall ſurvive, and therefore no covin is averrable in ſuch caſe; and yet if the ſurviver of two to whom the Fee is limited dieth, his heir within age, ſuch heir ſhall be in Ward: So if ſuch Lands be given to two, and to the heirs of him of thoſe two who ſhall firſt come to the Church of Paul; Now it is uncertain which of them ſhall firſt come to the Church of Paul, yet if he who firſt cometh to the Church of Paul dieth, his heir within age, he ſhall be in Ward; which Caſes prove, that covin and fraud were not the cauſe of making this Statute, but onely the thankfulneſs of the Subjects unto the King for his bounty, as aboveſaid; for if this Act had not been made, the Subjects ſhould not have power to diſpoſe of their Lands for the advancement of their children, but all ſhould deſcend: So as now the King hath loſt the Wardſhip and Primer ſeiſin of two parts of the Lands of his Tenant, and hath alſo loſt the averment of covin, which he had by the Common Law, where Eſtates were made by the King's Tenant for advancement of their children. In reſpect of which loſſes, the Subjects gave unto the King Wardſhip in caſe where the Lands continue in jointure: as to that which hath been ſaid, That this Statute ſhall not be taken by equity, I conceive the contrary, the words of the Statute are, In every ſuch caſe, i. e. In every like caſe, not onely

onely where two, or more persons hold jointly to them and the heirs of one of them, but also in every the like Case; as the Case now in question, and in every Case where the life of him who hath the Freehold, is the sole impediment, quo minus, the heir hath not the Land by descent in Demesne: And it may be resembled unto the Statute of Marlbridge of Collusion, which speaks of Leases for years, Quas tradere voluerint ad terminum annorum; and yet a Lease for life, or Lease for years is within the said Statute; for the Statute was made in restraint of an ill liberty, that the Tenants had by the Common Law in prejudice of their Lords, which see 4 E. 6. 53. & Plow. 59. And as to the word [otherwise] that may be construed, for payment of his Legacies: And as to equity enlarging, the Statute speaks [where many hold, and to the heirs of one;] yet, if two hold, to them and the heirs of one of them, the same is within the Statute: And as to Equity restraining, he puts this case; Land is given to the Husband and Wife, and the heirs of the body of the Wife, who have issue, the Wife dieth, the issue within age, he shall not be in Ward; and yet he is within the Letter of the Statute, but because that other matter, That the Estate for life, in the Husband is an impediment, Quo minus, he shall be in Ward: It is a maxim of the Common Law, That the father shall have the Wardship of the son and heir apparent, therefore he shall not be within the meaning, although he be within the Letter of the Statute: So, if Lands be given to my Villain, and to another, and to the heirs of my Villain, who dieth seised, his heir within age, I seise the Villain, and claim the remainder, he shall not be in Ward; and yet he is within the Letter of the Statute: But I conceive, in our Case, the King shall have two Wards, Simul & semel, the heir general of Wiseman, and the issue in tail; the heir general by the Common Law, by reason that his father was the King's Tenant, who disposed of his Lands for the advancement of his children; and therefore the Queen shall have the third part in Ward: And also the heir special shall be in Ward, for that part of the Statute. And it is no new thing to have two Wardships for one and the same Lands: As 14 H. 8. of the heir of Cestuy que use, and also of the Feoffee; and if the Tenant dieth seised, having issue a daughter, who is his heir, the Lord seiseth the daughter, and marrieth her, and afterwards a son is born; he shall have the Wardship also of him: So of the heirs of the Disseisor and Disseisee; and he said, If Lands holden in chief be leased for life, the remainder to A. in Fee, A. dieth, his heir within age, he shall be in Ward, and that by reason of these words in the Statute, [In every such case] it is not the same Case, but the like Case; for if he who hath the Fee dieth, so as the Freehold survives to the other; now the Estate becomes as an Estate for life, the remainder over. It was adjourned.

24 *Eliz.* In the Exchequer.

## CLXXXIV. *The Lord* Howard *and the Town of* Walden's *Case.*

More Rep. 159. Post 162, 163.

BEtwixt the Lord Howard and the Town of Walden, the Case was, That the King made a Feoffment in Fee of Lands, parcel of his Dutchy of Lancaster, Tenend. in feodi forma reddend. inde sibi, & hæredibus suis, aut illi cui de jure reddi debet, 10 l. The question was, How, and of whom the Tenure should be? It was argued by Plowden, That it should be holden of the King, as of his Dutchy; he said, The King is not bounden by the Statute of Quia emptores terrarum; but here, upon this Feoffment, the Feoffee shall hold of the King, as of his Dutchy: All Grants of the King, notwithstanding that they be of Lands, yet they savour of the person of the King and his Prerogative being wapt

up

up in his perſon; ſhall guide the diſpoſition of the land; and he ſaid, that this Tenure ſhall be implyed by reaſon, and in reſpect of his perſon: And the Statute of Quia emptores terrarum, extends to Tenants oneiy, Libere tenentes magnatum & aliorum; but the King is not Libere tenens alicujus magnat. 32 H. 6. 21, 22. The King hath an Advowſon in the Right of his Dutchy, to which being void, he preſents; he may repeal his preſentment: and he vouched divers preſidents of Grants of the King of ſuch lands to hold of him, as of his Dutchy, and ſometimes of others: And the King by his Dutchy ſeal may give lands in Mortmain; and the King under his Dutchy-ſeal, hath made divers Corporations within his Dutchy, And although this Rent be a new thing, never parcel of the Dutchy, yet, becauſe it is iſſuing out of the Dutchy lands, and reſerved thereout, ſhall be of the ſame nature, and accounted parcel of the poſſeſſions of the Dutchy: If before the Statute of Weſt. 3. one ſeiſed of lands on the part of his mother, made a Feoffment in Fee, Tenend. by ſuch ſervices, and died, the Seignory ſhould go to the heir on the part of his mother, and ſhould be deſcendable as the land it ſelf, in lieu of which it came: And if Tenant in tail: now after the Statute of 32 H. 8. makes a Leaſe for years according to the Statute, rendring Rent to him and his heirs, it ſhall be expounded ſuch heirs which are inheritable to the land, according to the entail. Manwood, chief Baron, Demanded of Plowden, this Queſtion; The King makes a Feoffment in Fee of lands of his Dutchy, Is the ſame a matter of Record? who anſwered, yes, Manwood, Cruely no, for then there needed not any livery. Egerton, Solicitor, argued to the contrary, and he argued much upon the Statute of 1 H. 4. and 1 H. 7. of the ſeparation of the Dutchy of Lancaſter from the Crown, which ſee in the Comment. 215. in the Caſe of the Dutchy of Lancaſter; by which Acts, the poſſeſſions of the Dutchy were veſted out of the body Politick of the King, and veſted in his body natural, and are as their corporal holding in the King, as they were in the Duke of Lancaſter, being a Subject; who if he had made a Feoffment, the Feoffee ſhould not hold of him, but of the King; Ergo, ſo ſhall it be in the caſe where the King himſelf makes a Feoffment: and he cited a Caſe, put in the end of the Dutchy Caſe, 4 Eliz. 223. The Queen made a Feoffment of lands of the Dutchy out of the County Palatine, to hold of her in Capite; the Feoffee ſhall hold of her in Capite as of her Crown of England. The caſe went farther; the King after this Feoffment, granteth the Fee-farm, the Queſtion is, If the Rent reſerved upon this Feoffment ſhall paſs by ſuch grant or not: and he ſaid, That this Rent is not parcel of the Fee-farm, but rather a collateral charge upon the land; for in all caſes where there is a Tenure expreſſed in fait, or implyed in Law, there the rent reſerved after, ſhall not be parcel of the Tenure, but a Rent in groſs by it ſelf: As in our caſe, Tenend. in feod. firm. makes a Tenure; therefore the Reddend. after ſhall not make the ſum reſerved parcel of it: 33 E. 3. Annuity 52. before the Statute of Quia Emptores terrarum; a man makes a Feoffment in Fee, Tenend. de Dominis Capital. rendring the rent of 20l. that Rent is a Rent in groſs and not parcel of the Tenure. King E. 6. granted to Cranmer Archbiſhop, and his heirs, Tenend. by the fifth part of a Knight's-fee, Reddend. 61. per ann. Cranmer in Feoffment in Fee to the uſe of himſelf for life, the remainder to the uſe of his ſon in tail, the remainder to the uſe of the right heirs of Cranmer made a Fee, who is attainted of Treaſon, by which the remainder to his right heirs Eſcheats to the King, and ſo the Seignory is extinct; but it was adjudged, That the Rent was in eſſe, and not extinct by the Eſcheat of the remainder, for it was not parcel of the Seignory: So here in our caſe. Another matter was moved; If this Rent, being a new thing created, de novo, and not parcels of the poſſeſſions of the Dutchy, 1 H. 4. nor

1 H. 7.

1 H. 7. ſhall be accounted in Law in the right of the Crown, or of the Dutchy; and if of the Crown, then it cannot paſs by the Dutchy-ſeal: and the Statute of 1 H. 4. ſpeaks of ſuch Lands and Tenements which were to his Anceſtors, Dukes of Lancaſter; but this Rent never was in them, &c. and the Queen cannot enlarge the poſſeſſions of her Dutchy by her own Act; and therefore, if J. S. being Tenant in Fee-ſimple, be impleaded in a Præcipe quod reddat, and ſaith that he holdeth for life, the remainder to the King in Fee in the right of his Dutchy; now this remainder is veſted in the King in the right of his Crown, and not in the right of his Dutchy; for it is onely an Eſtoppel: So the Villein of the King, in the right of his Dutchy, purchaſeth lands, the King ſeiſeth, he ſhall have the lands in the right of his Crown, and not in the right of the Dutchy: If the King giveth Common out of his lands, parcel of his Dutchy, and afterwards makes a Feoffment in Fee of the lands out of which the Common is granted, and afterwards the Commoner dieth without heir, the King ſhall have the ſame in the right of his Crown, and not in the right of the Dutchy: So, although the rent doth follow the nature of the lands out of which it is iſſuing, yet it is not ſo to all intents; and he ſaid, That by the Statute of 2 & 3 Phil. & Ma. the King could not enlarge the poſſeſſions of the Dutchy; and therefore by the ſaid Act, authority is given for to anner poſſeſſion unto the Dutchy by Letters Patents; And there is another clauſe in the ſaid Statute, That if any part of the poſſeſſions of the Dutchy have been alienes, or granted unto any ſubject, and are reverted to the Crown by Eſcheat, attainder, forfeiture, purchaſe, &c. they ſhall be deemed and accepted parcel of the Dutchy; which caſe proves, That if the King makes a Feoffment of ſuch lands, the ſame is a Tenure in chief; for if it were a Tenure of the Dutchy, then upon Eſcheat, it ſhould be parcel of the Dutchy again, without the help of that Statute. Now, this Rent being a Rent in groſs, and not parcel of the Seignory, Reddendo Domino Regi, hæredibus & ſucceſſoribus ſuis, aut Domino, aut Dominis feodi, when the King grants the Seignory to the Lord Audley, it hath been moved, that it was in the Election of the Feoffee, to pay the Rent to the King, or to the Lord Audley; but that is not ſo, for although the Law be ſo betwixt Subjects, yet in caſe of the King it is otherwiſe; for the King ſhall never be over-reached by an Election: and therefore he ſhall pay the Rent to the King. It was adjourned.

*Hill.* 18 *Eliz.* In the Common Pleas.

## CLXXXV. *The Executors of Sir* William Cordel *and* Clifton's *Caſe.*

3 Len. 59. THE Caſe was, The Earl of Weſtmerland, ſeiſed of a Manor, whereof the Demeans were uſually let for three lives, by Copy, according to the cuſtome of the Manor, granted a Rent-charge to Sir William Cordel, Pro concilio impendendo, for the term of his life; and afterwards conveyed the Manor to Sir William Clifton in tail; The Rent is behind, Sir William Cordel dieth, Sir William Clifton dieth, the Manor deſcends to John Clifton, who grants a Copihold to Hempſton: the Executors of Sir William Cordel diſtrain for the Rent; It was agreed by the whole Court, That the Copyholder ſhould hold the land charged. Windham, Juſtice, It hath been adjudged, that the wife of the Lord ſhall not be endowed againſt the Copyholder, which Periam granted, but gave the reaſon of it; for the Title of the Dower is not conſummated before the death of the husband; ſo as the Title of the Copyholder is compleated before the Title of Dower; but the Title of the Grantee of the Rent is conſummated before the Dower,

2 Roll, 157.

12 Brownl. 208.

Antea 109.

Dyer 270.

More 94.

Fenner

Fenner conceived, That the Executors could not diſtrain upon the poſſeſſion of the Copyholder, and he argued, that this caſe is not within the Statute of 32 H. 8. of Wills; For by the preface of the ſaid Statute, he conceived, That the ſaid Statute did extend but to thoſe caſes for which by the Common Law no remedy was provided; but in this caſe, the Executors by the Common Law, might have an Action of debt, ergo: But Periam and Windham, contrary; For this Statute doth intend a farther remedy for that miſchief, (ſcil.) not onely an action of debt, but alſo diſtreſs and avowry: See the words of the Statute, Diſtrain for the arrearages, &c. upon the lands, &c. which were charged with the payment of ſuch rents, and chargeable to the Diſtreſs of the Teſtator; or in the ſeiſin or poſſeſſion of any other perſon or perſons claiming the ſaid lands, onely by and from the ſame Tenant by purchaſe, gift, or deſcent, in like manner and form as their Teſtator might or ought to have done in his life time: And it was moved by Fenner, That here the ſaid land charged, doth not continue in the ſeiſin or poſſeſſion of the Tenant; and here Sir John Clifton was iſſue in tail, and therefore he doth not claim onely by the father, but per formam Doni; and therefore he is not liable; therefore neither his Copyholder.

Shuttleworth, Serjeant, contrary, That Sir John Clifton was chargeable; and he claims onely from them who immediately ought to have paid the Rent, and the Copyholder claims by purchaſe from Sir John Clifton, ſo he claims from Sir William Clifton the Tenant, &c. although he doth not claim immediately from him: For if the Tenant ought to have paid it, and dieth, and the land deſcendeth to his heir, and the Heir maketh a Feoffment in Fee, the Feoffee ſhall be charged within this Statute, although he doth not claim immediately: ſo where land deſcends from the Tenant which ought to have paid it, and ſo from Heir to Heir. The Statute of 1 R. 3. wills, that all grants, &c. ſhall be good againſt the Donor, his Heirs, &c. claiming onely as Heirs to Ceſtuy que uſe, &c. Yet, if Ceſtuy que uſe granteth a Rent-charge, and the Feoffees are diſſeiſed, the Grant ſhall be good againſt the Diſſeiſor; and yet he doth not claim onely by Ceſtuy que uſe: And although Sir John Clifton be Tenant in tail, and claims per formam Doni; Yet, becauſe the Eſtate tail cometh under the Eſtate of him who grants the Rent, he ſhall be ſubject to the charge. And this Statute extends not onely to him who claims by the Tenant, but alſo to the Heir of him who grants, &c. And by Windham and Rhodes, The Copyholder doth not claim onely by the Lord, but he claims alſo by the cuſtome; but the cuſtome is not any part of his Title, but onely appoints the manner how he ſhall hold, &c. The poſſeſſion continues here in Sir John Clifton, for the poſſeſſion of his Copyholder is his poſſeſſion; ſo as if the Copyholder be ouſted, Sir John Clifton ſhall have an Aſſiſe: And ſo the ſtrict words of the Statute are obſerved, for the ſeiſin and poſſeſſion continues in Sir John Clifton who claims onely by Sir William Clifton who was the Tenant in demean who ought to pay the Rent. But Fenner ſaid to that; that the ſeiſin and poſſeſſion intended in the Statute, is the very actual poſſeſſion, (ſcil.) Pedis diſpoſitio, and ſuch a poſſeſſion in which the diſtreſs may be taken and that cannot be taken in a Freehold without an actual poſſeſſion.

## CLXXXVI. 19 *Eliz.* In the Common-Pleas.

3 Len. 65.

A Seised of land in Fee, by his Will in writing, granted a Rent-charge of 5 l. per an. out of it to his younger son, towards his Education and bringing up in Learning, and if in pleading, the Devisee ought to aver that he was brought up in Learning was the Question: And it was holden by Dyer, Manwood and Mounson, that such averment needs not; for the Devise is not conditional; and therefore, although he be not brought up in Learning, yet he shall have the Rent: and the words of the Devise, are, Towards his bringing up; and he well knew, that 5 l. per an. would not, nor could extend to maintain a Scholar in Learning, in diet, apparel, books, &c. and this Rent, although it be not sufficient to such purpose, yet he shall have it; And Dyer said, That such a case was here: Two were bound to stand to the award of certain persons, who awarded that the one of them should pay unto the other 20 s. per an. during the term of six years, towards the education and bringing up of such a one an Infant, and within the two first years of the said term the Infant died, so as now there needed not any supply towards his education; yet it was adjudged, that the yearly sum ought to be paid for the whole term after; for the words [toward his education] are but to shew the intent and consideration of the payment of that sum, and no word of condition, &c.

Dy. 329. a.

## *Mich.* 20 *Eliz.* In the Common Pleas.

## CLXXXVII. West *and* Stowel's *Case*.

1 Cro. 870. Townsend. 17. 1 Roll 28. More 549. Sty. 353. a.

IN an Action upon the Case, by Thomas West against Sir John Stowell, The Plaintiff Declared, That the Defendant, in consideration that the Plaintiff promised to the Defendant, that if the Defendant shall win a certain match at shooting, made between the Lord of Effingham and the Defendant, then the Plaintiff should pay to the Defendant 10 l. and promised to the Plaintiff, That if the said L. Effingham shall win the same match of the Defendant, that then the Defendant would pay to the Plaintiff 10 l. And farther declared, That the Lord Effingham won the match, for which the Action is brought. It was moved, that here is not any sufficient consideration; for the promise of the Plaintiff to the Defendant, Non parit actionem, for there is not any consideration upon which it is conceived, but is onely, Nudum pactum, upon which the Defendant could not have an Action against the Plaintiff. And then here is not any sufficient consideration for the promise of the Defendant. Mounson, Justice conceived, that here the consideration is sufficient, for here this counter promise is a reciprocal promise, and so a good consideration, for all the communication ought to be taken together, Manwood, Such a reciprocal promise betwixt the parties themselves at the match, is sufficient; for there is consideration good enough to each, as the preparing of the Bows and Arrows, the riding or coming to the place appointed to shoot, the labour in shooting, the travel in going up and down between the marks: But for the Bettors by, there is not any consideration, if the Bettor doth not give aim: Mounson, A cast at Dice alters the property, if the Dice be not false; wherefore then is there not here a reciprocal Action? Manwood, At Dice the parties set down their monies, and speak words which do amount to a conditional gift; (scil.) If that the other party cast such a cast he shall have the money.

19 *Eliz.* In the King's-Bench.

## CLXXXVIII. Dunne's *Case.*

DUnne poſſeſſed of divers goods in divers Dioceſes died inteſtate at Briſtow; The Biſhop of Briſtow committed adminiſtration to Jones and his Wife, who adminiſtred; and afterwards the Biſhop of Canterbury, by reaſon of his Prerogative, committed adminiſtration to Auſten and Dunne, and they brought an Action of Treſpaſs againſt Jones and his Wife, for taking of the goods of the inteſtate; It was holden by Wray and Southcote, that the Letters of adminiſtration granted by the Biſhop of Briſtow, were void: Gawdy and Jeofreys, contrary; for the granting of Letters of Adminiſtration, de mero jure, doth belong to the Ordinary; and it might be that neither the Ordinary, nor the parties to whom he granted the Letters of Adminiſtration had notice that the Inteſtate had bona notabilia in another Dioceſe, and therefore it ſhould be hard to make the Defendants Treſpaſſors; Exception was taken to the Declaration, becauſe it is ſhewed that the Archbiſhop of Canterbury, by reaſon of his Prerogative, committed Adminiſtration, &c. without ſhewing that the Inteſtate had bona notabilia, &c. but the Exception was not allowed, for ſo are all the precedents, as the Declaration is here, which all the Clerks in Court did affirm; and afterwards Exception was taken to the Bar, becauſe it is there pleaded, that the Defendant had paid a certain ſum of Money to one A. to whom the Inteſtate was indebted by Bond, and did not ſhew how the Bond was diſcharged, as by Releaſe, Acquittance, cancelling of the Bond, &c. And that was holden to be a material Exception: For the Defendants in ſuch caſe, ought to ſhew ſuch diſcharge, which is ſufficient, and by which the Plaintiffs may be diſcharged; and for that cauſe the Plaintiff had Judgment to recover. 5 Co. 2, 30. 1 Cro. 283. 457.

19 *Eliz.* In the King's-Bench.

## CLXXXIX. Kingwell *and* Chapman's *Caſe.*

IN an Action of Debt upon a Bond, by Kingwell againſt Chapman; The Defendant pleaded, that it was endorſed upon condition, That where divers debates were betwixt the Plaintiff and one J. Brother of the Defendant, the ſaid Plaintiff and J. put themſelves to the award of one Copſton, and the Defendant was bound by Bond to the Plaintiff, that his brother ſhould perform the award of the ſaid Copſton: And the award was, That the ſaid J. ſhould pay to the Plaintiff 30 l. viz. at the Feaſt of the Annunciation 20 l. and at Michaelmas after 10 l. and ſhewed, that the ſaid J. had paid the ſaid 20 l. at the Annunciation; and as to the 10 l. he pleaded, That the ſaid J. died before the ſaid Feaſt of Michaelmas, upon which there was a demurrer: And by Wray, Southcote and Gawdy, Juſtices, the Bond is forfeit. Firſt, becauſe the ſum awarded by the Arbitrament, is now become a duty; as if the condition of the Bond had been for the payment of it: Secondly, day is appointed for the payment of it, 10 H. 7. 18. Thirdly, the Executors cannot perform the condition. But if I be bound by Bond to enfeoff the Obligee at ſuch a day, and before the ſaid day I die, my Executors ſhall not be charged with it; for the Condition is become impoſſible by the Act of God, for the Land is deſcended to the heir. 1 Cro. 10.

20 *Eliz.* In the Common-Pleas.

## CXC. Lodge's *Case.*

Syderf. Rep. 362.

LOdge, an Attorney of the Common-Pleas, was indebted unto Booth in 34 l. payable at a day to come, and Booth was indebted to Diggs in 40 l. Diggs, according to the custome of London, attached in the hands of Lodge 34 l. to be paid to him at the day, as part of his debt of 40 l. Lodge brought a Bill of Privilege, directed to the Mayor and Sheriff of London, and that every person, who had cause of Action against Lodge, Sequatur ad Com. Legem, &c. Si sibi videbitur expedire, &c. At the return of which Writ, Bendloes prayed a Procedendo. And by Harper, Justice, the privilege shall not be allowed, because that this Attachment is by custome, and not allowable here; and if Lodge should have the privilege, then is the other party without remedy: And if an Attorney of this place be impleaded in London upon a Concessit solvere debit. alterius, he shall not have the privilege. Manwood contrary; For according to the Common Law, Lodge owed nothing to Diggs, but is his Debtor by a custome: And as to the Case of Concessit solvere, there the promise was to the party himself, who brought the Action; and he hath no other remedy; but in the Case at Bar, Diggs, who is a stranger, veres Lodge, who owes him nothing, having remedy against his proper Debtor, which Dyer granted, and farther said, That the privilege of this Court ought not to be impeached by any custome: And the Prothonotaries cited a Case adjudged in the point; That such a privilege was allowed in the Case of one Underhil, and afterwards in the principal Case the privilege was allowed.

21 *Eliz.* In the Common-Pleas.

## CXCI. Segar *and* Bainton's *Case.*

3 Len. 74.

IN an Action of Trespass, the Case was, That King Hen. 8. an. 27. of his reign, gave the Manor of D. to Sir Edw. Bainton Knight, and to the heirs males of his body; Sir Edw. Bainton had issue, Andrew his eldest son; and the now Defendant his younger son, and died; Andrew Bainton covenanted by Indenture with the Lord Seymore, That the said Andrew Bainton would assure the said Manor to the use of himself for life, the Remainder to the use of the said Lord and his heirs; and the said Lord in recompense thereof, should assure other Lands to the use of himself for life, the remainder to the use of the said Andrew Bainton in tail, who, 37 H. 8. levied a Fine of the said Manor without Proclamations to two strangers, to the uses according to the said agreement, and before any assurance made by the said Lord, the said Lord was attainted of Treason, by which all his Lands were forfeited to the King: And afterwards the said Andrew Bainton made a suggestion to Queen Mary of all this matter; and upon his humble Petition, the said Queen by her Letters Patents, reciting the said mischief, &c. Et præmissa considerans, & annuens Petitioni illius, granted to him the Manor aforesaid, and farther, De ampliori gratia sua, did release to the said Andrew Bainton, all her right, possession, &c. which came to her, Ratione attincturæ præd. vel in manibus nostris existant, vel existere deberent; after which, 5 Eliz. Andrew Bainton levied a Fine to the Plaintiff with Proclamations, and died without issue, and the Defendant, as issue in tail, entred.

Puckering, Serjeant: First, it is to see, if by the words of the Patent of Queen Mary; viz. De ampliori gratia, &c. the Reversion in Fee which the Queen had, shall pass or not? Secondly, Admitting that the

the Reverſion doth not paſs, then if the Fine levied by Andrew Bainton, 5 Eliz. to the Plaintiff, the Reverſion being in the Queen, be a bar unto the iſſue in tail? For as unto the firſt Fine levied, 37 H. 8. which was without Proclamations, the ſame ſhall not bind the iſſue in tail, neither as to the right, nor as to the Entry, for it is not any diſcontinuance, becauſe the Reverſion is in the King; as of things which do not lie in diſcontinuance, as Rent, Common, &c. for ſuch a Fine is a Fine at the Common Law, and not within the Statute of 4 H. 7. and ſuch Fine is void againſt the iſſue: But if ſuch a Fine without Proclamation be levied of a thing which lieth in diſcontinuance, then ſuch a Fine is not void, but voidable by Formedon: and therefore this Fine in the Caſe at Bar being levied without Proclamation of Lands entailed, whereof the Reverſion is in the King at the time of the Fine levied, ſhall not bind the iſſue: and by ſuch Fine the Conuſee hath nothing but a Fee determinable upon the life of Tenant in tail, which Fee was forfeited to the Queen by the Attainder of the Lord Seymore, and that the Queen moved of pity, did reſtore the ſame to A. B. in recompence, for the Indentures of themſelves were not ſufficient to raiſe any uſe: See 1 Mariæ, Dyer 96. As to the firſt point, it ſeems that nothing paſſed of the Reverſion, for the Grant hath reference to the words, All her Right, Poſſeſſion, &c. which came to her ratione attincturæ, and all the reſidue of the Grant ought to have reference to that, to the ratione attincturæ, which was the foundation of the whole Grant: and here the intent of the Queen was not to any other intent but onely to reſtore A. B. to the ſaid Manor, or to his former Eſtate in it; and nothing appears in the Letters Patents, by which it may appear, that the Queen was knowing of her Reverſion which ſhe had by deſcent, and therefore the ſame cannot paſs by general words. If the Queen grants the Goods and Chattels of all thoſe which have done any Treſpaſs, for which vitam amittere debent, the Goods of him who is attainted of Treaſon ſhall not be forfeited to the Grantee by ſuch general words: 8 H. 4. 2. The King grants omnia Catalla Tenentium ſuorum, qualitercunque damnatorum, the ſame ſhall not extend to the Goods of him who is condemned of Treaſon: See 22 Aſſ. 49. So in our Caſe the Patent ſhall not ſerve to two intents, but to a reſtitution of the Manor, and then nothing paſſed by this Patent but the Fee determinable, which was conveyed to the Lord Seymore, and forfeited by his Attainder. Then we are to ſee, how after this grant the ſaid A. B. is ſeiſed. And he ſaid, That he ſhall be in of the ſaid Fee determinable, and not of the Eſtate tail againſt his own Fine; and then if he be not ſeiſed by force of the Entail at the time of the Fine levied, 5 Eliz. the ſame Fine cannot bind the tail: But admit that at the time of the ſecond Fine levied he was in of an Eſtate in tail, yet the ſame Fine ſhall not bar his iſſue: For firſt, this Fine cannot make any diſcontinuance, becauſe that the Reverſion in Fee is in the King, which is not touched by the Fine: See the Caſe of Sanders, where A. makes a Leaſe to begin at a day to come, and afterwards levies a Fine to a ſtranger with Proclamations; the five years paſs, and afterwards at the day of the Commencement of the Leaſe the Leſſee enters, his entry is lawfull, and he ſhall not be bound by the non-claim. And ſo it was adjudged 21 Eliz between Sanders and Starky. After the making of the Statute of 4 H. 7. of Fines, it was much doubted, if the iſſues of common Tenants in tail ſhould be bound by a Fine with Proclamation, foraſmuch as upon the death of their Anceſtours they were as new purchaſors per formam doni: and therefore it was provided by the Statute of 32 H. 8. that the ſaid Statute of 4 H. 7. ſhould extend to ſuch common Entails; but there was no doubt of the Eſtate tail of the Gift of the King: and ſee betwixt Jackſon and Darcy, Mich. 15 and 16 Elizab. Rot. 1747. in a Partitione facienda,

facienda, the Case was, Tenant in tail, the Remainder to the King after the Statute of 32 H. 8. levied a Fine with Proclamations, and adjudged, that that should bind the issues: and the Act of 32 H. 8. doth not extend, but where the Reversion is in the King, but no mention is there of a Remainder, because the words of the said Act are general, of all Tenants in tail, the makers of the said Act perceiving that it might be a doubt, that the generality of the said words might exclude Estates tail of the Gift of the King, they have restrained the words in a special manner, as appeareth by the last words of the same Act: Nor to any Fines heretofore levied, or hereafter to be levied by any person or persons of any Manors, &c. before the levying of the said Fine to any of his or their Ancestors in tail by Letters Patents, or Act of Parliament, the Reversion whereof, at the time of the levying of such Fine, was in the King: and so such Estates are excepted, and that in such Cases where such Fines are levied, they shall be of such force as they should have been if the said Act had not been made; and therefore he conceived, it appeared at the said Parliament, That such Estate tails of the Gift of the King were not bound by 4 H. 7. for otherwise that Proviso or Exception had been frivolous.

Walmsley, Serjeant, to the contrary; and he agreed, That the first Fine doth not make any discontinuance; and yet he conceived, it is not altogether void against the issues before that they enter, for no Right remains in the Conusor against his Fine: and he conceived also that this clause, ex uberiori gratia nostra, did extend to pass more than passed before, for he conceived that the Queen intended more liberally, viz. the Reversion, for this same is not any matter of Prerogative, but this is a matter of interest which might even in the Case of the King pass out of the King by general words: And see 3 H. 6. 6 and 7 Br. Patents; A Grant of the King ex insinuatione shall not hinder the force of the words ex mero motu. And the opinion of the Court was, That the Reversion which was in the King did not pass by this Grant: For the scope of the whole Patent was, as was conceived, to grant the same onely which the Queen had ratione attincturæ.

Anderson held the Patent insufficient, because that the Prohibition was not full and certain: Also he said, That ex speciali gratia, &c. would not help this Case, if it were well argued, for the Estate tail is not well recited, but onely that he was seised de Statu hæreditario, &c. so as the Queen was deceived. Periam, contrary; The Queen was apprised well of the mischief and Grant aforesaid, viz. of such Estate, with which he departed by the Fine. And as to the other point, it was the opinion of Walmsley, That the Fine with Proclamation did bind the Entail. And as to the Objection which hath been made, That the Conusor, at the time of the Fine levied, was not seised by force of the Entail, the same had been good matter to avoid a common Recovery, to alledge such matter in the Tenant to the Præcipe, but not to this purpose: for if Tenant in tail levieth a Fine, although he was not seised at the time of the Fine levied by force of the Entail, yet such a Fine shall bind the issues: So if the Tenant in tail doth discontinue, and disseiseth the Discontinuee, and so levieth a Fine. And he conceived, That the issue in tail is bound by the Statute of 4 H. 7. even of the Gift of the King. And see 19 H. 8. 6. and 7. where it is holden, That the issue in tail is bound by the Act of 4 H. 7. And whereas it hath been objected, That it doth not extend, but to such Fines which make a discontinuance at the Common Law; the same is not so: for if Tenant in tail of a Rent or Common levieth a Fine with Proclamation, it is very clear, that the issues shall be barred thereby: And he relied much upon the Book of 29 H. 8. Dyer. 32. Tenant in tail of the

Gift

Gift of the King levyeth a Fine, or ſuffereth a common Recovery, although it be not a diſcontinuance, becauſe the Reverſion is in the King, yet it is a bar unto the iſſue. But note, That that was before the Statute of 34 H. 8. And ſee now Wiſeman's Caſe, 27 Eliz. Co. 2. part. and ſee the Lord Stafford's Caſe, 7 Jacob. Co. 8 Reports, fo. 78.

21 *Eliz.* In the King's-Bench.

## CXCII. Pleadal's *Caſe.*

The Caſe was, That a man ſeiſed of Lands in fee, took a Leaſe by Indenture of the Herbage and Pawnage of the ſame Land: It was the Opinion of the whole Court, that the ſame was no Eſtoppel to him to claim the Soil or the Freehold: And it was ſaid by Plowden, and agreed by the Court, That if the Father and Son be Joint-tenants for an hundred years, and the Son takes a Leaſe of his Father of the Lands for fifteen years, to begin, &c. the ſame ſhall conclude the Son to claim the whole term or parcel of it by Survivor.

## CXCIII. 21 *Eliz.* In the Star-Chamber.

NOte, That in the Star-Chamber it was reſolved, by the Advice of many of the Juſtices, That an Infant having levyed a Fine, may declare the uſes upon it, and ſuch Declaration is good, notwithſtanding his Nonage: and Mr. Plowden affirmed, that ſo it was adjudged in his own Caſe, by which he loſt Lands of the yearly value of 40l. So a Declaration by a man in dureſſe is good, which Anderſon denyed. 2 Co. 10, 42, 57.

21 *Eliz.* In the Court of Chancery.

## CXCIV. *The Lord* Awdley's *Caſe.*

THE Lord Awdley, 12 H. 7. enfeoffed Hoddy and others of certain Lands in the County of Sommerſet, and afterwards by Indenture reciting the ſaid Feoffment, and the date of it, and alſo that it was to the intent that his Feoffees ſhould perform his Will, as follows in effect; viz. My Will is, That my ſaid Feoffees ſhall ſtand ſeiſed to the uſe, That the ſaid Hoddy ſhall receive of the yearly Profits of the ſaid Lands one hundred pounds, which he had lent to the ſaid Lord Awdley: and alſo ſtand ſeiſed to pay all his Debts upon Bills ſigned with his Hand; and after the Debts paid, That the ſaid Feoffees ſhall make Eſtate of the ſaid Lands unto him the ſaid Lord Awdley, and Joan his Wife, and to the Heirs of their Bodies, &c. with divers Remainders over. The ſaid Lord had iſſue by the ſaid Joan; and alſo had iſſue by a former Wife a Daughter: The Feoffees never made any Eſtate to the ſaid Lord and his Wife. And it was the Opinion of divers of the Juſtices and Sages of the Law, That upon this matter no uſe was changed, for it is not a laſt Will, but an intent. And although that the Feoffees ſhall be ſeiſed unto the uſe of the Feoffor and his Heirs, becauſe that no conſideration was, for which they ſhould be ſeiſed to their own uſe; yet the ſame cannot make a new uſe unto the ſaid Lord and his wife in tail, without conveying an Eſtate; for the wife is a ſtranger unto Dy. 166, 324, 325. 6 Co. Sir Ed. Clere's Caſe.

unto the land, and also to the other use. And it cannot be a Testament or last Will; for the Estate mentioned in the said Writing, ought to be made to the said Lord and his wife, who cannot take by his own Will. And this matter was depending in the Chancery; and the advice of the Justices being there required, they did deliver their opinions, That by this Writing, no use was changed, nor any Estate vested in the said Lord and his wife; and a Decree was made accordingly, untill proof might be made of such an Estate made.

21 *Eliz.* In the King's Bench.

## CXCV. Borough *and* Holcroft's *Case.*

Co. 3. Inst. 31. 4 Co. 45. IN an Appeal of Murther, by the son of the Lord Borough, of the death of his elder brother, Henry Borough, against Thomas Holcroft, who pleaded, That heretofore he had been indicted of the Murther of the said Henry Holcroft before J. S. Coroner of the Verge, and also Coroner of the County of Middlesex, within which County the Verge was; and upon that indictment he was arraigned, and confessed the indictment, and prayed his Clergy, &c. and demanded Judgment; If the Plaintiff should have this appeal? The Plaintiff, Replicando, said, by protestation, Nul tiel record, and for plea did demur in Law. Dalton, for the Plaintiff, took Exception to the plea, for the conclusion of it, viz. Judgment if appeal; where it ought to be, Judgment, if he shall be again put to answer: And he took a difference, where a matter is pleaded against the Plaintiff, to which the Plaintiff is party: As where a man pleads a Fine levied by the Plaintiff himself, there he shall conclude Judgment if action; but where the Fine is pleaded levied by the Ancestors of the Plaintiff, there he shall plead, Judgment, if against such Fine, &c. Vide, 9 H. 7. 19. At the common Law before the Statute of 3 H. 7. such conviction at the suit of the King did discharge the party convicted from farther trouble; but if the indictment upon which he was arraigned be insufficient, then it is not any plea. And here the indictment is insufficient; for by the Statute of Articuli super Chartas, cap. 3. the Coroner of the County, together with the Coroner of the King's Houshold shall do the Office which belongs to it, and send the roll, to which Office two Coroners are requisite; but here, in the taking of this inquisition there was but one person although two capacities, id est, Coroner of the County, and also Coroner of the Verge; and so the indictment was taken, Coram non Judice: See the Statute of the Star-Chamber, which is, That the Chancellor, &c. calling to them one Bishop, and one temporal Lord of the King's Council, &c. If the Chancellor be a Bishop; yet another Bishop ought to be called, &c. If I devise that my lands shall be sold by two Bishops, and J. S. hath two Bishopricks, yet his sale is not sufficient. Egerton, contrary, Although here is but one person, yet there are two Coroners: Quando duo jura concurrunt in una persona æquum est, ac si essent in diversis. At the common Law, before the Statute, De Articulis super Chartas, The Coroner of the Verge by himself might enquire of Murther; but because the Kings Court oftentimes removed into another County, by reason whereof no enquiry could be made, for the remedying thereof, that Statute was made, which is in the affirmative, and doth not abridge the common Law before, and therefore it shall have a reasonable construction: See the Statute of West. 1. cap. 10, By which it is enacted, that sufficient men shall be chosen Coroners, of the most loyal and the most sage

ſage Knights, this Statute ſhall not be taken, Stricto ſenſu, that none ſhall be choſen Coroners, but Knights; but the Statute requires, that ſufficient perſons ſhall be choſen. As to the Statute of 3 H. 7. It is to be known, That the common Law [before acquitted] was a good Plea, and the cauſe was for the great regard that the common Law had to the life of a man; In which caſe a great miſchief, as the Statute recites, did enſue, that to ſave the appeal of the party, they would not arraign the party within the year and day after the murther, within which time, the offender did compound with the party intereſſed; and ſo after the year expired, all the matter concerning the proſecution, at the King's ſuit, was put in oblivion: wherefore it was enacted, That ſuch offender ſhall be within the year arraigned at the ſuit of the King; and if the party be acquitted at the Kings ſuit, within the year and day, That the Juſtices before whom, &c. ſhould not ſet the party at large, but to remain in priſon, or to let him to bail, untill the year and the day be paſt; and within the ſaid year and day, the wife, or next heir to the party ſlain may take their appeal againſt the party ſo acquitted or attainted, the ſaid acquittal or attainder notwithſtanding; and he ſaid, that theſe words [perſon attainted] did not extend to perſon convicted; for they are two diſtinct conditions in Law; for attainder procures corruption of bloud, but the ſame is not wrought by conviction: and every Treaſon imports in it ſelf Felony; but yet notwithſtanding they are diſtinct Offences: See 22 E. 4. Coron. 44. where it was ordered by all the Juſtices of England, That none ſhould be arraigned of the death of a man, at the ſuit of the King, within the year and day; ſo as the ſuit of the party be ſaved. And the Juſtices counſelled all men of Law ſo to do, and that the ſame be executed as a Law without alteration, upon which rule of the Juſtices arole an inconvenience; for after that order of the Juſtices was known, The offender would practiſe with the party to whom the appeal by the Law belonged, to obtain from him a releaſe for ſome ſum of money, and then when the year and day paſſed, the heinouſneſs of the murther was out of memory; This miſchief being eſpied, was the occaſion of the making of the Statute of 3 H. 7. But the ſaid Statute doth not meet with our Caſe; but our Caſe is at the common Law, for this Statute extends onely unto perſons attainted; but a perſon convicted is not touched by it, and therefore being out of the words of the Statute, it ſhall be alſo out of the meaning of it; for being a penal Law, it ſhall be taken by equity, as all Statutes which give attaint ſhall be, Stricti juris, and ſhall not be taken by equity. It hath been objected, that the Statute de Frangentibus priſonam, 4 E. 1. hath been taken by equity, the ſame is not ſo; for it is not any penal Law, but the ſame mitigates the rigor of the common Law; for before that Statute, the breaking of the priſon was Felony in every caſe, but now it is not Felony, but where the party was committed to priſon for Felony, &c.

## CXCVI. 21 *Eliz.* In the Common Pleas.

IN a Formedon of a Manor, the Tenant pleaded Joynt-tenancy by Fine with J. S. The Demandant did aver the Tenant ſole Tenant, as the Writ doth ſuppoſe, and upon that iſſue was taken, and found for the Demandant; upon which, a Writ of Error was brought, and Error aſſigned in this. That whereupon Joynt-tenancy pleaded by Fine, the Writ ought to abate without any averment by the Demandant againſt it, the averment hath been received againſt the Law, &c. Southcote, At the common Law, If the Tenant had pleaded Joynt-tenancy by Deed, the Writ ſhould abate without any averment; but that was remedied by 34 E. 1. but Joynt-tenancy by Fine did remain as

Dyer 291. 3 Len. 92.

it was at the common Law, for he hath punishment enough in that by that plea, if it be false, he hath by way of conclusion given the moyety of the Land in demand to him with whom he hath pleaded Joynt-tenancy; and the Law doth not intend that he would so slightly depart with his land for the abatement of a Writ: As in a Præcipe quod reddat, the Tenant acknowledgeth himself to be Villein to a stranger; the Writ shall abate without any averment, if Frank and of Frank Estate; for the Law presumes, that the Tenant would not enthral his condition. Wray, to the same intent: But the Demandant may confess and avoid the Fine, as to say, That he that levyed the Fine was his disseisor, upon whom he had before entred, &c. And if Tenant in Fee-simple be impleaded, and he saith that he is Tenant for life, the remainder over to A. in Fee, and prayes in aid of A. the Demandant shall not take averment, that the Tenant, the day of the Writ purchased, was seised in Fee. Note that in this fine Joynt-tenancy was pleaded but to parcel. It was holden by Wray and Southcot, that the whole Writ should abate; As in a Writ the misnomer of one shall abate the whole Writ against all the Defendants: and so where the Demandant enters into parcel of the land in demand, if the thing in demand be one intire thing, it shall abate the whole Writ. In this Case, the Demandant ought to have in his Writ de Forsprise of the land in demand, whereof the Joynt-tenancy by Fine is pleaded, per availe, and under the gift of which the Formedon is conceived, and therefore in respect of the title of the Demandant, it remains in right, parcel of the Manor, and therefore ought to be demanded accordingly with an Exception: But if A. give to B. a Manor, except ten acres in tail, there if after upon any discontinuance, the issue in tail have a Formedon, in such case there needs no exception, for the said ten acres were never after the gift, parcel of the Manor which was given in tail, for they were severed from the Manor upon the gift; but if land in demand was several, as twenty acres except two, an exception is not good, for he might demand eight acres: See E. 1. F. N. B. 866. Præcipe unam bovat. terræ, except a Seleon, and the Writ was abated, for every demand ought to be certain, but a Seleon is a parcel of land uncertain, as to quantity, in some places an acre, in some more, in some less. Another point was, That because the Tenant hath admitted and accepted this averment, (scil.) sole Tenant, as the Writ doth suppose; If the Court notwithstanding the admittance of the Tenant ought without exception of the party, Ex officio, to abate the Writ; and Wray conceived, that they should, for it is a positive Law; as if a woman brings an appeal of murther upon the death of her brother, and the Defendant doth admit it without challenge or exception, yet the Court shall abate the appeal, 10 E. 4. 7. And see the principal Case there, Non ideo puniatur Dominus; and if an Action be brought against an Hostler upon the common custome of the Realm, and in the Writ he is not named common Hostler, and the Defendant doth accept of such Writ, without exception to it, yet the Court shall abate the Writ, Ex officio, 11 H. 4. 198. and 38 H. 6. 30.

## CXCVII. 24 *Eliz.* In the King's Bench.

Antea 150. More Rep. Saffron Walden's Case.

THE Case was this: King Henry the 8. seised of certain lands in the right of his Dutchy of Lancaster, Granted them unto another, Tenend. in Fee-farm, Reddend, dicto Dom. Regi, & hæredibus suis, aut illi cui de jure reddi debet rol. And if this land should be holden of the King in Capite, or holden of the Dutchy, was the question? Egerton Solicitor general, argued much upon the Statute of 1 H. 4. by which the Dutchy and possessions thereof were severed from the Crown: See

Plowden

Plowden in the Caſe of the Dutchy of Lancaſter, 213. And ſee ibid. the Statute of 1 H. 4. Entituled, Charta Regis, Hen. 4. 1. De ſeparatione Ducatus Lancaſtr. à Corona; by which it is enacted, That the Dutchy of Lancaſter, taliter & tali modo deducatur, gubernetur & pertractetur, &c. ac ſi ad culmen dignitatis Regiæ aſſumpti minime fuiſſemus: So as by that Act the Dutchy is diſjoined from the Crown, and in ſuch point as to poſſeſſion, as it was in a common perſon. But the poſſeſſion of the Dutchy doth not bind the perſon of the King: as 10 H. 4. 7. The King brings an Action for certain Lands to him deſcended from his Uncle, the Duke of Lancaſter, and the Writ was, Non omittas propter aliquam libertatem, and exception was taken to the Writ, becauſe that ſuch clauſe ought not to be in the King's Writ, but where the King ſueth as King, but that Writ he ſueth as Duke of Lancaſter, but the exception was not allowed; The King cannot ſue otherwiſe, but as King: for the perſon of the King ought not to be meaſured according to his poſſeſſion, ſo as it was a ſeverance in order, ſurvey, government and proceſs, and not in reſpect of the perſon. But after the Statute of 1 H. 4. The ſaid Act of Separation was repealed; and farther enacted, that the ſaid King ſhould hold the ſaid Dutchy to him and his heirs, Kings of England; ſo as thereby the Dutchy is ſettled in the politick Body of the King: afterwards came the Statute of 1 H. 7. by which it is enacted, That the King ſhall hold the ſaid Dutchy, and the poſſeſſions thereof, in ſuch manner and form, and ſo ſeparated from the Crown as King Henry the fourth and King Henry the fifth did hold the ſame, ſo as the Dutchy was deveſted out of the Body politick of the King where it was ſetled, 1 H. 4. and veſted in the Body natural of the King ſo as the poſſeſſion of the Dutchy, as to their government, &c. are in the King, as they were in the Duke of Lancaſter before he was King: and if the Duke of Lancaſter had made a Feoffment, &c. the Feoffee ſhould not hold of him, but of the King: So if the King himſelf maketh a Feoffment of Lands of the Dutchy, the Feoffee ſhall hold of the King, &c. which ſee in the Dutchy of Lancaſter's Caſe, in the end of it: And he conceived, That notwithſtanding the union of the Crown and the Dutchy, yet the privity of the Tenure doth remain, being preſerved by the ſaid Act of 1 H. 4. Another matter was, That here, the Tenure reſerved is Tenend. in feodi firma Reddend. 10 l. &c. And he ſaid, that this Rent is not parcel of the Tenure, but rather a Rent-charge collateral to the Tenure: For in all Caſes where there is a Tenure expreſſed in ſuit, or implied in Law before, there Reddendo following ſhall not make the thing rendred parcel of the Tenure, but it ſhall be a Rent in groſs; and here Tenend. in feodi firma, makes the Tenure, &c. and the Reddendo after ſhall not make the Rent reſerved parcel of the Tenure: See the Caſe 33 E. 3. Annuity 52. before the Statute of Quia Emptores terrarum, a man makes a Feoffment in Fee Tenend. de Dom. Capital. Feod. &c. Reddend. 10 s. Rent; here, becauſe that the Tenure was reſerved, Capital. Dom. feodi illius, this Rent reſerved is not parcell of the Tenure, but a Rent in groſs: King Edward the ſixth gave certain Lands to Cranmer, Archbiſhop of Canterbury, Tenend. by the fifth part of a Knight's Fee, Reddend. inde 61. per ann. Cranmer made a Feoffment in Fee to the uſe of himſelf for life, and afterwards to the uſe of his eldeſt ſon in tail, the remainder to the right heirs of Cranmer, who is attainted of Treaſon, by which the remainder in Fee eſcheated to the King, by which the Seignory is gone. But it was adjudged, that notwithſtanding that eſcheat, the Rent did remain, for the Rent was not parcel of the Seignory. Now this Rent being a thing newly created, and not parcel of the poſſeſſions of the Dutchy in 1 H. 4. nor ever deſcended from any Anceſtor of the King, being Duke of Lancaſter, ſhall be accounted to be in the King in the right of his Crown, and ſo cannot paſs by the Dutchy-ſeal: See the

3 Cro. 210, 211.

ſaid Statute of 1 H. 4. and the King cannot enlarge the ſaid Dutchy, nor the poſſeſſions thereof beyond the poſſeſſions which were of the Dutchy at the time of the making of the ſaid Acts: As if J. S. ſeiſed in Fee is impleaded, and he ſaith, that he holds the Lands in demand for life, the remainder to the King in the right of his ſaid Dutchy; now the ſaid remainder is veſted in the King, not in the right of the ſaid Dutchy, but in the right of his Crown. The Villain of the King in the right of his Dutchy of Lancaſter, purchaſeth Lands, the King ſeizeth, he ſhall be ſeiſed thereof in the right of his Crown, and not of the Dutchy: The King grants Common out of certain Lands parcel of his ſaid Dutchy, and afterwards makes a Feoffment of the ſaid Lands to another, the Grantee of the Common dieth without heir, ſo as the Common eſcheats to him; now he ſhall have the Common in the right of the Crown and not of the Dutchy; ſo although it is ſaid, That the Rent ſhall follow the nature of the Land out of which, &c. yet the ſame is but to ſome intents, and not to every intent: See the Statute of 2 and 3 Phil. & Ma. cap. 20. by which it is enacted, That all the Lands which have been granted or ſevered from the Dutchy to any perſon or perſons, and after ſuch grant, have come or reverted to the King in poſſeſſion, reverſion or remainder, or otherwiſe by attainder, eſcheat, forfeiture, &c. ſhall for ever be united to the ſaid Dutchy, and ſhall be adjudged and eſteemed as part and member of the ſame; which proves that ſuch Lands were not holden of the King, as Duke of Lancaſter, but as King; for if they had been holden of the Dutchy upon the eſcheat, they ſhould be parcel of the Dutchy again, without help of that Statute. See the ſpecial Reſervation; Reddendo Domino Regi, & hæredibus ſuis, aut illi cui de jure reddi debet, &c. Now, when the King grants the Seignory to the Lord Audley, it was in the Election of the Ter-tenant, to whom he would pay the Rent, if it had been in the Caſe of a common perſon; but it is otherwiſe in the Caſe of the King: As if A. holdeth of two ſeveral Lords by owel Feoffment, and dieth, his heir within age; the Lord which firſt gets the Ward ſhall have him; but in the Caſe of the King it is otherwiſe: Plowden, The King is not bound by the Statute of Weſt. 3. But in this Caſe, in the making of this Feoffment with this Tenend. & Reddend. the Feoffee ſhall hold of the King as of his Dutchy; for all grants of the King ſavour of the perſon of the King; and then his Prerogative wapt in the perſon, ſhall guide the ſame: and ſee the Statute of Weſt. 3. extends to all who make Feoffments, Tenend. de Feoffatoribus; but the King is not Tenant to any one. And if the King be ſeiſed of an Advowſon in the right of his Dutchy, and the ſame becomes void, and the King preſents to the ſame, he may repeal his preſentation: and he vouched divers precedents of Patents made to many great Lords, to hold of the Dutchy, and alſo to hold of others: And the King by his Dutchy-ſeal may give Lands in Mortmain. And he argued, That this Rent, although newly created, yet in ſo much as it came, and accrued in reſpect of the Land which was parcell of the Dutchy, it ſhould be accounted alſo parcel of the Dutchy; as if before the Statute of Weſt. 3. A. ſeiſed of Lands in Fee, of the part of his father makes a Feoffment in Fee, Tenend. by ſuch ſervices, &c. the ſame Seignory ſhall go to the heirs of the part of the father, in lieu of which the Seignory is come: Tenant in tail after the Statute of 32 H. 8. makes a Leaſe for years, according to the ſaid Act, rendring Rent to him and his heirs, it ſhall be intended, heirs in tail. It was adjourned.

*Paſch.* 26 *Eliz.* In the King's-Bench.

## CXCVIII. Forſter *and* Walker's *Caſe.*

IN an Ejectione firmæ, by Foſter againſt Walker; the Caſe was, That Richard Meager was ſeiſed of a houſe in London: and 6 E. 6. he deviſed the ſame to his Wife for life, the remainder to John his ſon in tail, the remainder to the Maſter and Wardens of the Coordwaynors in London, and died; the Wife entred and died, John died, The Maſter, Wardens and Commonalty of the Coordwaynors entred, and leaſed the Plaintiff upon whom the heir general of the Deviſor did enter. The onely queſtion was, inaſmuch as the Coordwaynors of London are incorporated by the name of Maſter and Wardens and Commonalty of Coordwaynors, If this deviſe made to them by the name of Maſter and Wardens of the Coordwaynors of London be good or not? It was argued by Daniel, that the Deviſe by the manner was good enough; and he inſiſted much upon the favour which the Law gives to Wills, and to Legatees in the Deviſes and conſtruction of them, even in Deviſes and Grants to Corporations: and as to Grants to Corporations, he cited the Caſe of the Dean and Chapter of Norwich: Decanus & Capitulum ſanctæ & individuæ Trinit. and they make a Leaſe, leaving out theſe words [ſanctæ & individuæ] and yet held the Leaſe was good, notwithſtanding that, for the words left out, are not words of ſubſtance of the name, but for the beauty and ornament of it: But in the Caſe of Deviſe, if the name be miſtaken in matter of ſubſtance, yet if upon the Deviſe the intent of the Deviſor ſufficiently appeareth, it is good enough: for the intent of the Deviſor ſhall guide the Deviſe, and therefore by Deviſe, the Fee-ſimple ſhall paſs without the word [Heirs.] And he ſaid, that the opinion of Wray, chief Juſtice, was in the Caſe of the Dean of Pauls: If I deviſe that my Executors ſhall aſſign my Lands to J. S. the ſame, implicative, is a Deviſe of the Lands themſelves to my Executors; for otherwiſe they could not aſſign. So, if I will and deviſe, That A. ſhall pay yearly out of my Manour of D. to J. S. 10 l. the ſame is a good Deviſe of the Lands to A. So if in the Caſe at Bar this houſe had been deviſed to the Coordwaynors by the name of the Society of Coordwaynors, ſuch Deviſe had been good enough: Cooper contrary; and he ſaid, That the intent of the Deviſor ought to agree with the Law, otherwiſe the Judges are not to regard it in point of Judgment; and he put the Caſe of 39 H. 6. 10. A. deviſeth his Lands, and afterwards is diſſeiſed, and before any entry dieth; now, notwithſtanding the intent of the Deviſor, the Deviſe is void; and he ſaid, The defect of a Will in words, in making of an Eſtate ſhall be ſupplied by intent, but the defect in words, in naming of the Deviſor or Deviſee ſhall never be ſupplied, See 49 E. 3. 3. & 4. the Caſe of Whitavers. And he cited a Caſe, 25 H. 8. A ſtranger of the Low-countries being made a Denizen in England, returned into his Countrey, and dwelling there became ſick; and in making of his Will, he was adviſed by Council, that by Deviſe of all his goods, his lands deviſeable would paſs, and therefore by ſuch words he declared his Will with the intention aforeſaid; (ſcil.) to paſs his Lands, and died, and afterwards the States of the Low-countries wrote unto King Henry the 8. acquainting him with the intention of the Deviſor, and alſo of the opinion of their Laws there upon the ſaid Will, and all in favour of the Deviſee; whereupon the King referred the conſideration of the matter to Norwick, then Lord chief Juſtice, who declared his opinion to the King to be, That by that Deviſe, the Lands did not paſs, notwithſtanding the intent of the Deviſor.

3 Cro. 106. Shepherd's Touch-ſtone of Conveyances, 416.

1 Rolls 616.

*Paſch.*

*Paſch.* 26 *Eliz.* In the King's-Bench.

## CXCIX. Crabdell's *Caſe.*

CRabdell was bound by Recognizance to his good behaviour; upon which the Queen brought a Scire facias, and ſurmiſed, that after the Recognizance acknowledged, the ſaid Crabdell was arreſted and taken by the Conſtable for ſuſpicion of Felony, and of his own wrong eſcaped: It was objected on the part of Crabdell, becauſe it is not alledged by matter in fact, that a Felony was committed. But the whole Court was of a contrary opinion; For it is not material, if the Felony were committed or not; for if a Subject be arreſted by a lawfull Officer, it is not lawfull for him to eſcape; but he ought to ſtand to the Law, and to anſwer unto the matter with which he is charged. And ſo Crabdell was forced to anſwer.

*Paſch.* 26 *Eliz.* In the King's-Bench.

## CC. Baſſet *and* Prowe's *Caſe.*

IN Debt upon a Bond, the Caſe was, That Baſſet was bound with Prowe as his ſurety, to one Preſton, in a Bond of 500 l. and that was upon a corrupt and uſurious contract againſt the Statute; and Prowe was bound unto the Plaintiff in a Bond as a counter-bond, to ſave the Plaintiff harmleſs from the ſaid Bond of 500 l. Baſſet is ſued by Preſton upon the ſaid Bond, and ſo damnified; and thereupon ſued Prowe upon the counter-bond, who pleaded againſt Baſſet, the Statute of Uſury, pretending that all aſſurances depending upon ſuch uſurious contract, as void by the Statute; but by the opinion of Wray, chief Juſtice, the ſame is no Plea, for the Statute is, That all Bonds, collateral aſſurances made for the payment of Money lent upon uſury, ſhall be utterly void; But the Bond here upon which the Action is brought, was not for the payment of the Money lent, but for the indempnity of the ſurety.

1 Cro. 588, 642, 643. 3 Len. 63. Goldsb. 174.

*Paſch.* 26 *Eliz.* In the Exchequer.

## CCI. *The Vicounteß* Bindon's *Caſe.*

THE Executors of Thomas, late Viſcount Bindon, brought Detinue in the Exchequer againſt the Widow of the ſaid Viſcount, and declared upon the detainer of certain Jewels, The Defendant did juſtifie the detainer of them as her Parophornalia: And it was ſaid by Manwood, chief Baron, That Parophorn. ought to be allowed unto a Widow having regard unto her degree; and here the Husband of the Defendant being a Viſcount, 500 Marks is a good allowance for ſuch matter.

More 213. 1 Cro. 250, 251, 252.

*Paſch.* 26 *Eliz.* In the King's-Bench.

## CCII. Offley *and* Johnſon's *Caſe.*

OFfley and Johnſon were bound as ſureties with one A. to B. who recovered againſt Johnſon in London, and had Execution againſt him; and now Johnſon ſued Offley, to have of him contribution to the ſaid

More 136.

ſaid Execution, ut uterque eorum oneretur pro rata, according to the cuſtome of London: Offley removed the cauſe by privilege into the King's-Bench, whereupon came Johnſon, and prayed a Procedendo; and becauſe upon this matter no Action lieth by the courſe of the Common Law, but onely by cuſtome in ſuch cities, The cauſe was remanded; for otherwiſe the Plaintiff ſhould be without remedy: See the Book of Entries, 160. Hob. 264. More 135. 3 Len. 148.

*Paſch.* 26 *Eliz.* In the King's Bench.

## CCIII. Litchfield *and* Cage's *Caſe.*

IN an Ejectione firmæ, the parties were at iſſue; and by the order of the Court, the Trial was ſtayed, and yet the Plaintiff againſt the Order, did privily obtain a Niſi prius, of which, Gawdy, Juſtice, being informed of it after the Term, awarded a Superſedeas unto the Juſtices of Aſſiſe, before whom, &c. and yet notwithſtanding that, the Enqueſt at the inſtance of the Plaintiff was taken, and found for the Plaintiff; and all this matter was ſhewed to the Court in the King's-Bench, and there examined and moved, and it was ordered by the Court, that the Verdict ſhould not be entred of Record, nor any Judgment upon it: And ſo it was put in ure in a Caſe between Vernon and Fowler. And then the Plaintiffs Councell took exception to the Superſedeas, becauſe it was not ſubſcribed with the hand of Gawdy, but, non allocatur; for the Seal is ſufficient. 3 Len. 100.

*Paſch.* 26 *Eliz.* In the King's Bench.

## CCIV. Scott's *Caſe.*

WIlliam Scott was indicted upon the Statute of 23 Eliz. of Recuſants, by the name of William Scott of Southwark, Gent. and upon that Indictment Judgment given for the Queen; upon which Scott brought a Writ of Error, and aſſigned for Error: That in the Indictment Scott is not named of any Pariſh, but generally of Southwark; for within Southwark, there are divers Pariſhes, and by the ſaid Statute it is ordained that the penalties accruing by the ſaid Statute ought to be divided in three parts, whereof one part is to be applied to the relief of the poor reſident in the Pariſh where the offence was committed, and therefore it ought to appear upon the Indictment of what Pariſh the party Indicted is, or otherwiſe, Non poteſt conſtare Curiæ, to which Pariſh the third part of the Penalty doth belong, ſo that full execution may be made according to the Statute: But the whole Court was clear of opinion, That the Indictment is good enough, notwithſtanding that Exception; for all the penalty which accrues by the ſaid Statute, belongs firſt to the Queen; viz. a third part thereof to her own uſe, another third part for the relief, ut ſupra, to be delivered by Warrant by the Officers of the Receipt of the Exchequer. And afterwards the Inhabitants of the Pariſh in which the offence was committed, are to ſue in the Exchequer for their third part of the penalty, and ſurmiſe in their Bill, that the offence was committed within their Pariſh; and Rule was entred accordingly.

Paſch.

*Paſch.* 26 *Eliz.* In the Common Pleas.

## CCV. Gerrard's *Caſe*.

3 Len. 98. GErrard, Maſter of the Rolls, preſented Chatterton, Biſhop of Cheſter, to the Church of Bangor; to which Church, one Chamber's alſo preſented his Clerk, by which ſeveral preſentments the ſaid Church became Litigious: The Archbiſhop of York being loci illius Ordinarius, awarded a Jure Patronatus, &c. depending which, the Archbiſhop admitted the ſaid Biſhop; whereupon Chambers Libelled in the Spiritual Court againſt the ſaid Biſhop, becauſe the ſaid Archbiſhop, Dicto Epiſcopo plus æquo favore admiſit dictum Epiſcopum, pendente the Jure Patronatus, in which caſe, by the Law of the Church, the admittance is void; For, Lite pendente, nihil movetur: and now came the ſaid Biſhop, and prayed upon that matter a Prohibition, which was granted becauſe that the right of the Patronage came in debate, after which came the ſaid Chambers, and prayed a conſultation, becauſe he did not meddle with the right of the Patronage, but onely with the tortious admittance. To which it was ſaid by the Court, That the awarding of the Jure Patronatus, is not a thing of neceſſity, but at the will of the Ordinary, and ſo for his better inſtruction; but if he will at his peril, take notice of the right of the Patronage, he may admit which of them he will, without a Jure Patronatus awarded: And it may be in this Caſe, that after the Jure Patronatus awarded, and before any Verdict given upon it, the Archbiſhop was ſatisfied of the right of the now Plaintiff in the Prohibition to the Patronage, and thereupon admitted the Clerk, &c. and if he was deceived to ſubject himſelf unto a Quare Impedit, whereof he had diſcharged himſelf, if he had attended the Verdict in the Jure Patronatus: and by the clear opinion of the Court, the Conſultation was denyed.

*Mich.* 29 & 30 *Eliz.* In the Common Pleas.

## CCVI. Barker *and* Taylor's *Caſe*.

THE Caſe was; That a woman, Tenant in tail, within the Statute of 11 H. 7. accepted of a Fine, Sur Conuſans de droit come ceo, &c. and by the ſame Fine, rendred back the lands to the Conuſor for 100 years. It was moved, If this conveyance and diſpoſition be within the penalty of the ſaid Statute; for the Statute ſpeaks of Diſcontinuances, &c. And it was the clear opinion of the whole Court, That it is within the Statute; for by ſuch practice, the meaning of the Statute might be defeated: and if ſuch a render for
3 Co. 51. 100 years ſhould be good, by the ſame reaſon, it might be for 1000 years, which is like miſchievous, and as dangerous unto him in the reddition, as a Diſcontinuance: And by Rhodes, Juſtice, It hath been adjudged, That if a woman, who hath Title of Dower, before that ſhe be endowed, will enter, and levy a Fine, that the ſame is within the ſaid Statute, and yet ſhe is not Tenant in Dower: See Dyer, 5. Ma. 140. Penycock's Caſe; and ſee now, 36 Eliz. Sir George Brown's Caſe adjudged accordingly.

Trin.

*Trin.* 29 *Eliz.* In the Common Pleas.

## CCVII. Morris *and* Webber's *Case.*

IN an Ejectione firmæ, by George Morris against Webber, alias Turnor, the Plaintiff declared upon a Leaſe by Humphrey Bury, &c. And upon Not guilty, the Jury found this ſpecial matter: That Hen. Bury was ſeiſed, Et cepit in uxorem quandam Willmottam Gifford. 4 Mariæ. And afterwards: 1 Eliz. the Libelled in the Spiritual Court againſt the ſaid Henry, in cauſa divortii de nullitate matrimonii; and found upon the Libel, In hæc verba, and all the ſentence upon it; viz. In Dei Nomine, Amen. Per depoſitiones & examinationes Medicorum, & aliorum fide dignorum, & honeſtarum, & expertarum matronarum comperimus & invenimus: Quod prædict. Henr. & Willmotta legit. ætatis & plenæ puberti exiſt. per duos annos integros ſimul cohabitaverunt, & in uno lecto concubuerunt, & licet dict. Willmotta operam liberis dare cupierit, nunquam tamen per carnalem copulam cum dicto Henrico conjungi, aut ab illo cognoſci potuit, aut poteſt, idque propter vitium perpetuæ frigiditatis & naturæ impotentiæ generandi, Quæ nulla medicorum opera curari pot; idque prædict. Humphrid. ſæpius confeſſus eſt, ſe nunquam cum prædicta Willmotta tanquam virum cum uxore conjunctum fuiſſe, aut conjungi potuiſſe. Igitur invocato primitus Dei nomine, Matrimonium prædict. irritari, ceſſari quatenuſcunque de facto proceſſit, caſſum, irritum, nullumque in Lege, Juribus juris omnino carere, & carere debere decernimus, & declaramus, ipſoſque quatenus ſunt de facto matrimonialiter ad invicem conjuncti a vinculo Matrimonii ſeparamus, &c. Humphry made a Feoffment in Fee unto the uſe of himſelf for life, and after to the uſe of the firſt, or eldeſt ſon of the body of the ſaid Henry in tail. Willmot married Cary, Henry took to wife Phillippam Mountjoy ſcientem Matrimonii prædict. & definitivæ ſententiæ prædict. & durantibus ambobus Matrimoniis, tam inter dict. Cary & Willmotta, quam inter dictos Henricum & Phillippam, dicta Phillippa exitum habuit per dict. Henricum, Humphrey the Leſſor, upon which Leaſe the Plaintiff declared, Humphrey died: Henry entred, and leaſed to the Plaintiff. Shuttleworth, Serjeant, argued for the Plaintiff, That this Divorce not reverſed or undone by appeal, or otherwiſe, ſhould ſtand in force, and according to it the Law of the Land ſhould judge: See 47 E. 3. 17. Caſu ultimo. Five manner of Divorces are mentioned: 1 Cauſa profeſſionis: 2 Præcontractus: 3 Conſanguinitatis: 4 Affinitatis: 5 Frigiditatis; upon a Divorce, Cauſa profeſſionis, the wife ſhall be endowed, and the heir ſhall inherit, but in the other not. And the principal Cauſe is reported by the Lord Dyer, 2 Eliz. 179. where Cary and Willmott levying a Fine of the lands of Willmott, as husband and wife; and it was moved, That ſuch Fine ought not to be engroſſed, becauſe that now the Divorce is avoided; for Henry in his ſecond marriage hath iſſue, therefore there is no perpetua frigiditas, &c. but at the laſt it was engroſſed, becauſe the ſentence of the Divorce doth continue in its force, and then Humphrey, born in the ſecond marriage, is the firſt ſon of Henry lawfully begotten, and ſo capable of the uſe to him limited upon the Feoffment of Henry 22 E. 4 Fitz. Conſultation, 51. by Catesby: where my father and mother are divorced without lawfull cauſe, and afterwards they marry themſelves elſewhere, and die, the ſaid Divorce, as long as it is in force ſhall bind me in point of inheritance, and I cannot have an Action as heir, &c. during the Divorce, is in force: For the Divorce being a ſpiritual Judgment ſhall not be reformed but in the ſpiritual Court; and therefore this ſentence of Divorce, Cauſa perpetuæ frigiditatis, as long as it is in force not repealed or reverſed, ſhall bind all perſons: But

5 Co. 98.

in some cases, such a Divorce shall not disable the party to sue; as if a man bringeth an Action, De muliere abducta cum bonis viri, where after the trespass committed, the husband and wife are divorced, yet the Action lieth, for this Action is not in the right, but in possession onely, and in such Action, Never accoupled in legal Matrimony, is not any plea, but the Defendant ought to answer to the possession, Not his wife; for although they are divorced, yet the Action lieth: and if Judgment is given in the Spiritual Courts, the Courts of the King shall receive and admit of them, as long as they are in their force. The Abbat of Fountain's Case, 9 H. 6. 32. the custome of the Abby was, That at every vacation of the Abbat, the Monks should proceed to a new Election, and that he who should be chosen by the greater number of the Monks, should be Abbat: and the Case was, That upon such avoidance, one A. was elected by the greater number of voices, (scil.) 22 Monks. And B. was chosen by the lesser number, (scil.) 20 Monks; but notwithstanding that, B. entred and carried himself as Abbat, by the Institution of the Visitor, and made a Deed by consent of the Covent, and died; it was holden, That the said Deed should bind the House: for here is a Spiritual Act, (scil.) the Institution of the Visitor, which being in force, shall bind us, and our Law, 34 H. 6. 38. upon contention betwixt two Patrons, claiming the presentment unto a Church, the Bishop awarded, jure Patronatus, which found for one of them, upon which the Bishop admitted the Clerk of him for whom it was found by the jure Patronatus; and afterwards, the other party brought a Quare impedit, and it was found for him: Now this judicial Act done by the Bishop, shall excuse the Bishop from any disturbance. Fenner, Serjeant, contrary, Although that the sentence of this Divorce be set down in peremptory and final terms, as matrimonium cassum, irritum, nullum, yet our Law shall respect the cause and ground of it, (scil.) Perpetua frigiditas, &c. and now it appeareth by the success of the second marriage, (scil.) the issue Humphrey, that the cause and matter upon which the Divorce was grounded, &c. was an offence of the time, and not of nature for he is now recovered; and in as much as the Church hath erred in the sentence of this divorce, which error is now apparent; this Court shall adjudge according to the truth of the matter, as the Spiritual Law ought to have adjudged, and not as they have adjudged: And he cited Fox's Case, 16 Eliz. The said Fox being Parson of a Church, was deprived in the Parliament time for incontinency, and by the same Parliament, all incontinencies were pardoned; Now upon the matter, we are to adjudge this deprivation meerly void without any other spiritual act. At another day, the Case was argued by Walmsley Serjeant, That the sentence definitive of the Spiritual Court, in cause of divorce, causa frigiditatis, should stand; and he argued much in what manner the Law of the Church, and the Law of the Land should determine marriage: and he argued that the right of marriage, was determinable by the Spiritual Law; and he said, that such sentences ought to be passed by our Law: and taken notice of; and therefore he who pleads a Divorce, ought to shew before what Judge the Divorce is had, to the intent the Judges may know to what persons they shall write for the trial of it; and it appears in our books, That our Law takes upon it the Conusance of the competency of an Ecclesiastical Judge; which see, 2 E. 4. 15 and 16. The Judges of the temporal Courts of the King, have determined, That the Pope is not a competent Judge within this Realm: and it is true, the Common Law doth yeild unto the Law of the Church the trial and determination of the right of marriage; but the trial of the possession of the marriage retains to it self: As if an Infant marrieth within the age of consent, and afterwards at full age of consent, doth disagree, now the common Law shall determine that the same is not any marriage: So

11 H.

11 H. 4. 167. The temporal Court ſhall adjudge upon marriage in fact and in poſſeſſion, but if the party will plead, That they were never accoupled in lawfull mattrimony, a Writ ſhall go unto the Biſhop to certifie the ſame; and in treſpaſs, De muliere abducta cum bonis viri, and in Cui in vita, &c. this iſſue, not his Wife, is to be tried by the temporal Court of the King: for the right of the marriage is not in queſtion, but it is ſufficient, if it were a marriage in fact and in poſſeſſion: See 44 Aſſ. 12. & 13. and ſee 21 H. 7. 39. The temporal Court ſhall determine of the marriage, if void or voidable: A Deacon marrieth a Wife, that marriage is not void, ſo of a Prieſt; but if a man marrieth a Nun, the marriage is void: But in our Caſe, here is a ſentence definitive, in a cauſe of Divorce, in which Caſe it doth not belong to us to examine the cauſe, but be the Divorce right or wrong, it ſhall ſtand, &c. 10 E. 3. Bar. 296. Niſi ſit quoad thor. tantum, vel cauſa caſtitatis: And ſee by Shelley, 28 H. 8. 13. If they of the ſpiritual Court give Judgment in any cauſe, be it true or falſe, untill it be defeated or reverſed, it ſhall bind all the world: See 22 E. 4. Fitz. Conſultation 5. Corbet's Caſe, 4 H. 7. 14. by Oxenbridge, 18 E. 4. 30. by Chock; and 9 E. 4. 24. He who pleads a Divorce, ought to ſhew before what Judge the Divorce was had; but that is not to examine the matter, but to know to what perſon the Court ſhall write for the trial of it. It is true, that in caſe of Reſignation and Deprivation, but in caſe of Divorce, the cauſe thereof ought to be ſhewed; for ſome Divorces diſſolve the marriage utterly, and do baſtardize the iſſue, and diſable the Wife to be endowed; and ſome Divorces do not diſſolve it: as that which is but à thoro & menſa, 11 H. 7. 27. But generally, in ſpiritual Judgments, the cauſes of them do not fall in Judgment in any temporal Court: 3 H. 4. 34. An Excommengement pleaded without ſhewing of any cauſe; and although in our Caſe, the cauſe of this Divorce being for Frigidity, Sublata jam cauſa toleretur effectus; and now, the party in whom ſuch frigidity is alligned, is become whole, as appeareth by his ſucceſs in his ſecond marriage, having now iſſue; yet we ought not to regard that, for then we ſhould reſort unto the cauſe of the Divorce, with which we are not to meddle. Gawdy, Serjeant, to the contrary: And firſt he confeſſed, that the determination of the right of marriage doth belong unto the ſpiritual Court; But as unto the Caſe in queſtion, (ſcil.) the Divorce in cauſa frigiditatis, it appeareth by 44 Aſſ. 13. by Knivet, That the party may receive his Nature, in which caſe he may have again his Wife, and there need not in ſuch caſe a new marriage; And becauſe that here it appeareth, That Bury hath recovered his Nature forasmuch as he hath now iſſue by another Wife, the Divorce is become of no force, which ſee Dyer 2 Eliz. 179. where the Caſe now at the Bar was in debate; Where a Woman inheretrix took a Husband, from whom ſhe was divorced, cauſa frigiditatis, the Wife afterwards was married to Carle, by whom ſhe had iſſue, and gave all her Inheritance to her ſaid ſecond Husband: and the firſt Husband alſo took a Wife, of whom he had iſſue; in that Caſe, the opinion of the Doctors was, That the firſt Husband and his Wife ſhould be compelled to cohabite together as Man and Wife, becauſe Eccleſia decepta fuit in priore judicio. Anderſon, That which we have argued is very clear; (ſcil.) That the Eccleſiaſtical Court hath authority to determine the right of marriage; But the point of this Caſe is, if this Judgment of Divorce being given for cauſe of Frigidity which was adjudged to be perpetual; and now by matter ſubſequent it appeareth that the party is not frigidus, but he hath recovered his Nature, if the Divorce ſhall be accounted ipſo facto void, without other circumſtance of the ſpiritual Law: and although their ſentence be definitive in terms, yet upon this ſpecial mattter, ex poſt facto, if the force thereof ſhall fail. And I have conferred with many learned in the Canon Law, which are of ſuch opinion; and of that opinion was Doc-

1 Len. 53, 181. 3 Len. 129.

for Dale; and therefore it is convenient, that your Clients, each of them do retain one who is learned in the ſaid Law, who can inform us what their Law is. And Rhodes, Juſtice, agreed in this Caſe to what the Lord Anderſon ſaid, and put the Caſe which was in the King's-Bench, 16 Eliz. Foxe's Caſe, which is before vouched, and it was adjourned. And after, at another day, by the appointment of the Juſtices, the Caſe was argued in Court by the Civilians and Canoniſts: Goldingham, on the part of the Plaintiff, and Steward on the part of the Defendant: And firſt it was ſaid on the Plaintiff's part, That by the ſentence, all the matter, tranſit in rem judicatam, and therefore we ſhall not reſort to the matter cenſured, the ſentence being in its force. And as to that, it was answered by Steward, That tranſit in rem judicatam, but not in caſe of marriage, and in the like caſes, where vertitur periculum animæ; for in ſuch caſes the ſentences are ſubject to the ſucceſs; as if after it appeareth, Eccleſiam fuiſſe deceptam per errorem licet probabilem (ut illi loquuntur) for then periculum animæ vertitur, for then they ſhould continue their Adultery, unleſs the ſentence of the Church be annulled. Goldingham, It tranſit in rem judicatam, non quoad inſtantiam, non quoad cauſam: ſo that as long as the ſentence is in force, it is cauſa judicata; yet the cauſe is ſubject to the cenſure of the Church. Steward, In our Caſe here, all our Books are, Matrimonium ſit nullum: Goldingham, The words are alſo in ſuch, reparabitur matrimonium, in which it is implied, that ſome ſolemnity of the holy Church is requiſite in ſuch reparation of marriage. Steward, where a man is divorced, cauſa frigiditatis, it is prohibited by ſuch ſentence that he ſhall not marry again, and if he doth marry, he is holden in our Law perjured, and an Adulterer; and to that purpoſe he cited divers authorities of the Canon Law. Goldingham, This ſentence is not properly a Divorce, for here was never properly a marriage: as in Caſes de præcontract. Divorce upon that cannot be ſaid properly a Divorce, but a ſentence of the Church upon the errour of the parties: and he put many degrees of impoſitions in ſuch caſes, Perpetua frigiditas, & naturalis impotentia generandi; frigiditas ex malefacio: i. e. quoad unam aliquam perſonam, and many others, quæ poſſunt matrimonium contrah. & dirimere contractum: and the ſentences which in our Law, are contra jus conſtitutionis: as where there is not any Citation, Declaration, or that the ſentence is of another thing than that which is contained in the Libell, in ſuch caſes the ſentence is utterly void; but ſentences there given, contra jus partis, are voidable onely; See Panormit. fraternitatis: Si notorie apparet ſententiam Divortii fuiſſe injuſtam, libet revocari, non obſtante quod non fuerit appellat. Sententia ceſſat cum notorie conſtat de injuſtitia: Et in Inſtitutionibus juris. Can. 189. Si vir cauſetur arctitudinem in muliere, per quam non eſt habilis ad coeundum, & ex eo ſeparatur, Si mulier poſtea aliquem invenierit qui ſeras reſerare poſſit, ad primum conjugium redire compellandi ſunt: vid. corpus Canon. 357. conjugium confirmatur officio, ſed poſtquam confirmatur officio non licet viro uxorem dimittere, nec uxori à viro diſcedere niſi cauſa fornicationis, verum antequam confirmatur impoſſibilitas officii ſolvit vinculum conjugii: And Panorm. fratern. propter Arctitudinem mulieris, ſi apparet quod præter divinum miraculum abſque periculo corporis habilis reddi non poſſit, ſeperentur: matrimonium tamen redintegrabitur ſi poſt appareat Eccleſiam fuiſſe deceptam: Per matronarum viſum datum fuit intelligi quod nunquam potuit eſſe mater, & eam ob cauſam divortium inter eos celebrat. fuit, mulier virum cepit, qui ſeras reſeravit, ſententiam divortii per errorem licet probabilem novimus eſſe prolatam, cum patet ex poſt facto quod ipſa cognoſcibilis erat illi cujus ſemen commiſcetur, & ideo inter ipſam & primum virum matrimonium extitiſſe, Quare inter eam & ſecundum conjugem matrimonium non eſſe, &c. Eoſque præcipimus ab invicem ſeperari. Vid. ſecundum partem Summæ Sylveſtrianæ. Si Eccleſia ſit decepta in hoc quod ille in quo erat impedimentum carnalem copulam cum alia perfecerit, redintegrabitur præcedens matrimonium,

nium, & dirimetur ſecundum, quamvis de ſententia Eccleſiæ factam. Et alibi: Si Eccleſia ſe deceptam invenierit ex hoc quod impedimentum quod judicavit perpetuum, apparet temporale, redintegrabitur primum matrimonium, &c. And afterwards the Caſe was adjourned.

Afterwards, that is to ſay, Mich. 30 and 31 Eliz. the Caſe was moved again, and Judgment was prayed for the Plaintiff; and then the Lord Anderſon, Ex aſſenſu ſociorum, commanded that Judgment ſhould be entred for the Plaintiff; and ſhewed unto the Council of both parties, That about the Certificate, which the four Doctors have ſhewed unto us, of their opinions upon the point, we our ſelves have conferred with the ſaid Doctors, who have given us their anſwers, That the ſaid ſentence of Divorce being yet in force, not reverſed is peremptory, and not ſubject to the ſucceſs: and although in the examinations and depoſitions taken in the Eccleſiaſtical Court, no matter appeareth, upon which ſuch peremptory Divorce might be granted, yet it might be, as we are informed by the ſaid Doctors, that upon the examination of Phyſicians and Matrons, ſufficient matter did appear to the ſaid Eccleſiaſtical Judges, (which for modeſty ſake ought not to be entred of Record) and that appeareth within the ſentence; i. Habito ſermone cum matronis & medicis, which ſpeech not entred of Record (cauſa qua ſupra) might be the cauſe that induced the Eccleſiaſtical Judges to give ſentence for the Divorce, notwithſtanding that the matter within the Record be too general to prove, naturalem frigiditatem generandi, but rather maleficium; and afterwards Judgment was given for the Plaintiff, and ſo the ſentence is bound by the Divorce, as long as the ſentence doth continue in force: See this Caſe in Coke, 5 Part. Where upon a Writ of Error brought, 41 Eliz. the Judgment was affirmed.

*Trin.* 29 *Eliz.* In the Common-Pleas.

## CCVIII. Gittinſon *and* Tyrrel's *Caſe.*

Gittinſon brought an Action of Debt againſt Tyrrel, Warden of the Fleet, by a Bill of Privilege, but he would not appear; and the Court was in great doubt, what remedy the Plaintiff hath to compell the Defendant to appear. For he cannot be fore-judged the Court, becauſe he hath an Eſtate of Inheritance in the ſaid Office; And afterwards it was ſurmiſed to the Court, That the ſaid Tyrrel had made a Leaſe of his ſaid Office to another for three years, and then the Court was clear of opinion, That the ſaid Tyrrel ſhould not have the Privilege; for now during the Leaſe, he is not Officer, but the Leſſee.

*Trin.* 29 *Eliz.* In the Common-Pleas.

## CCIX. Harris *and the Lord* Mountjoy's *Caſe.*

HArris affirmed a plaint of Debt in the Guildhall in London, againſt the Lord Mountjoy, and made an Attachment of the goods of the ſaid Lord in the hands of Sir Drew Drewrie; The Lord removed the matter into the Common-Pleas, by a Writ of Privilege; If now the ſaid Lord ſhall find Bail was the queſtion, becauſe that he is a Lord of the Parliament, &c. And the opinion of the whole Court was, that he ſhould find Bail, for that is the courſe of the Court, whoſoever is party. And by Anderſon, admitting the Law to be, That the Body of a Lord of Parliament ſhall not be taken in Execution (which I do not Dalton's Off. of Sher. 105.

not believe) yet notwithſtanding that Bail ſhall be found in ſuch caſe: For the condition of Bail doth conſiſt upon two points: Firſt, that he render his Body to Priſon in Execution, if Judgment be given againſt him. Secondly, or to pay the condemnation: And therefore if the Body of a Baron of Parliament is not ſubject to Execution, yet the Bail ſhall ſtand for the ſecond; i. e. to pay the condemnation; and all the Juſtices were of clear opinion, That for Execution upon a Statute-ſtaple, Merchant, upon the Statute of Acton Burnel, or upon the Statute of 23 H. 8. The Body of a Baron of Parliament ſhall be taken in Execution; for by theſe Statutes, ſuch perſons were not exempted.

CCX. *Trin.* 29 *Eliz.* In the Common-Pleas.

NOTE, It was ſaid, That the diviſion of a great Meadow into many parcels, by making of Ditches, is not waſte; for the Meadow may be the better for it; and it is for the profit and eaſe of the occupiers of it: And by Windham and Rhodes, Juſtices, If a Termor converteth a Meadow into a Hop-garden, the ſame is not waſte, for it is imployed to a greater profit, and it may be a Meadow again: Periam, Juſtice, Although it be a greater profit, yet it is alſo with greater labour and charges; And the converſion of a Meadow into an Orchard is waſte, although it may be to the greater profit of the occupier. Hob. 234.

CCXI. *Mich.* 29 & 30 *Eliz.* In the Common-Pleas.

IN a Replevin, the Defendant avowed for damage feaſant, and upon iſſue joined, it was found for the avowant, and damages aſſeſſed; and now iſſued a Retorno habendo, upon which the Sheriff did return, Averia elongata, whereupon a Withernam was awarded, and now came the Plaintiff and tendred in Court the damages aſſeſſed by the Jury, and prayed ſtay of the Withernam, and threw the Moneys into Court; but the whole Court was clear againſt it, for in this Caſe the Plaintiff ought to pay a Fine, becauſe he had eſſoigned the Cattel, which is a contempt; wherefore the Court aſſeſſed a Fine of three ſhillings four pence upon the Plaintiff, and then the Plaintiff had his Prayer.

*Paſch.* 29 *Eliz.* In the Common-Pleas.

CCXII. Shrewsbury *and the Inhabitants of the Hundred of* Aſhton.

AN Action upon the Statute of Hue and Cry, was brought by Shrewsbury againſt the Inhabitants of the Hundred, of the three Hundreds de Aſhton in the County of Bucks: It was moved on the part of the Defendants, That if upon ſuch Hue and Cry the Inhabitants do their endeavours, as much as in them is, to follow and take the Malefactors, and yet they cannot apprehend them, that in reaſon they ought not to be charged by the ſaid Statute. But the whole Court was ſtrongly againſt it: And by Anderſon, The Inhabitants of the Hundred, in which the Robbery was done, are bound to apprehend the Felons, or ſatisfie the party robbed. And the party robbed is not bound to give notice to the Inhabitants, nor to direct them which way the Felons took their flight, but the Inhabitants are bound to follow the Felons without any

any ſuch inſtruction, and after the Enqueſt was taken, and gave a Verdict in this manner: That whereas the Plaintiff had declared, That the Robbery was done in the Pariſh of D. in the Hundred aforeſaid, the Jury found, that the place where the Robbery was done, is a Lane within the ſaid Hundred; and that the one ſide of the ſaid Lane is within the Pariſh of S. and the other ſide within the ſaid Pariſh of D. and that the Robbery was done in the ſide of the ſaid Lane, which was in the Pariſh of S. and prayed the opinion of the Court upon that matter. And the Court was clear of opinion, That notwithſtanding that Exception, the Plaintiff ſhould have Judgment; for here is the right Hundred which ought to be charged, and the miſtaking of the Pariſh is not to any purpoſe. But then it was moved on the part of the Plaintiff; that for as much as the Verdict aforeſaid was ſpecial, by reaſon of the doubt which the Jurors conceived upon the miſtaking of the Pariſh, in the Plaintiff's Declaration, That the charges of the Jurors ſhould be indifferently born by both parties, as the uſuall is in caſes of ſpecial Verdicts; but the whole Court was clear againſt that, and commanded that the Plaintiff alone ſhould pay the ſaid charges, for the matter here found ſpecially is not any doubt, but out of all queſtion, for it is clear that the Action is well brought, for as much as the Hundred is charged, the miſtaking of the Pariſh ſhall not hurt.

*Trin.* 29 *Eliz.* In the Common-Pleas.

## CCXIII. Hellyard's *Caſe.*

A Habeas Corpus was to the Warden of the Fleet, to bring the body of one Hellyard, who retorned the writ, That the ſaid Hellyard was committed to the Fleet, Per mandatum Franciſci Walſingham, Militis unius principalium Secretariorum Dominæ Reginæ, &c. And becauſe the Warden did not ſhew in his Retorn for what cauſe the ſaid Hellyard was committed, the Court gave him day to amend his Retorn, or otherwiſe the priſoner ſhould be delivered.

## CCXIV. *Mich.* 30 *Eliz.* In the Common-Pleas.

UPon a Recovery in a Writ of Entry, Sur diſſeiſin of two acres of land, Habere facias ſeiſinam was awarded, The Sheriff as to one acre retorned Habere feci; as to the other tarde. And the Retorn was ſhewed to the Court; and all the Juſtices but Periam held, that the Sheriff ſhould be amerced for that Retorn, contrary and repugnant in it ſelf; But by Periam, it may be, That the acre of which no ſeiſin is had, was ſo far diſtant from the other acre, whereof ſeiſin was, that the Sheriff, for want of time, could not make execution of both, being ſo remote the one from the other. To which it was anſwered, That if the truth of the Caſe was ſuch, then might the Sheriff make execution in one acre in the name of both acres. And if upon a Capias ad ſatisfaciend. againſt two, the Sheriff doth retorn as to one, Cepi, and to the other tarde, he ſhall be amerced, for thoſe ſeveral Retorns cannot ſtand together.

*Mich.* 30 *Eliz.* In the Common Pleas.

## CCXV. Edgar *and* Criſpe's *Caſe.*

EDgar recovered againſt Criſpe in Debt, and afterwards releaſed to Criſpe, and afterwards, notwithſtanding the releaſe, Edgar ſued for a Capias ad ſatisfaciend. againſt Criſpe, and purſued the ſame untill

Criſpe

Criſpe was outlawed: and it was the opinion of Anderſon, cheif Juſtice, That Criſpe ſhould have an Audita Querela, notwithſtanding the Outlawry; and if the Audita Querela paſſeth with Criſpe, the Outlawry alſo ſhould be avoided.

*Trin.* 30 *Eliz.* In the King's Bench.

## CCXVI. Frankwell's *Caſe*.

IN Treſpaſs for carrying away of Tithes, the Caſe was; That Frankwell, Parſon of the Church of D. was accuſed, in forma Juris, before the high Commiſſioners, who pleaded, that the ſame cauſe and crime was proſecuted againſt him in the Arches, and prayed that he might not be doubly vexed for one and the ſame offence; and notwithſtanding that he was deprived, and another Clerk preſented to the ſame Church by the Patron, and was admitted, inſtituted and inducted; and upon entry, brought Treſpaſs againſt the former Incumbent. And note, the manner of the Deprivation, as it was found by Verdict: That the Biſhop of London, with the aſſent of the other Commiſſioners, gave ſentence of Deprivation againſt him; and it was ſhewed, That the high Commiſſioners had not power by 1 Eliz. to give ſentence of any thing which is dependant in another Court: For it was not the intent of the ſaid Act, to take away the juriſdiction of the other Eccleſiaſtical Courts; for then it is in vain to have ſuch Courts: It was alſo moved, becauſe the pleading is, That the Biſhop of London, ex aſſenſu of the other Commiſſioners, gave ſentence, the ſame is a void ſentence; for it ought to be the ſentence of all the Commiſſioners, for they ſhall have equal authority: And to this purpoſe, he cited the Caſe, 29 H. 8. Dyer 40. where a Leaſe is made of Lands, whereof the Dean and Chapter are ſeiſed, in common, per nomen Decani ex aſſenſu, & conſenſu totius Capitul. but it was holden a void Leaſe; for the Chapter ought to be party to ſuch Leaſe; contrary, where the Leaſe is made of the Land which is the proper and peculiar Inheritance of the Dean: But that Exception was not allowed; for the form of Entries in all caſes, hath always been ſo. Coke, poſito, That the Commiſſioners ought not to proceed in this Caſe, yet, becauſe they have ſo done, the ſame ought not to be examined here; for the Judges here, ought to think that this Deprivation was duly made; for, cuique credend. in ſua arte, which Wrey granted: And it was ſaid by him, That the Court was created for two cauſes: 1 For the expedition of the cauſes depending in the ſpiritual Courts: 2 To give to ſuch Judges authority to puniſh offences in more high degrees; for before they could not but onely excommunicate, but now they may impriſon; and if the party had Libelled againſt him in the ſpiritual Court of the Arches, it is no reaſon but that the party for his own expedition, and for to procure due puniſhment againſt the offender, may ſend the cauſe into the high Court; and after Judgment was given according to the Deprivation: And afterwards Error was brought thereupon, and the Error aſſigned upon the matter in Law, whether the ſaid Deprivation was lawfull or not? Coke, I remember the reaſon of the Judgment given by the Court was, That admitting that the ſentence of the high Commiſſioners was erroneous; yet it ſhall bind untill it be reverſed by appeal, Fenner, If the party grieved might be reſtored by appeal, I agree, that ſuch ſentence ſhould bind untill it were reverſed; but in our Caſe, no appeal lieth from the high Commiſſioners, wherefore we ought to be helped here; or otherwiſe we are without remedy. Coke, If the Delegates give ſentence, no appeal lieth, and yet the party grieved ſhall not

Co. 4. Inſt. 326, 327.

not be helped here. Fenner, 16 Eliz. One Foxe was deprived the laſt day of the Parliament for incontinency, which offence was pardoned by the ſame Parliament, and that ſentence of Deprivation was holden void. Anderſon, In your Caſe, the offence it ſelf was pardoned and diſcharged: Alſo it is againſt a general Statute, of which every one ought to take notice. Periam, When the Caſe was in the Common Pleas, it was moved, If of a ſentence given by the high Commiſſioners, an Appeal did lie; and it was certified by Clark, Doctor of the civil Law, that it did; for the Commiſſioners are as the Delegates of the Queen: And as by the Canon Law one might appeal from the Delegates of the Pope, unto the perſon of the Pope; ſo now, one may appeal from the high Commiſſioners, to the perſon of the Queen: See for that, 24 H. 8. 12. Another Error was aſſigned, becauſe that the Commiſſion gave authority to the Commiſſioners, to adjudge upon confeſſion of the party, or upon the witneſſes; but here none of theſe two ways is found by the Verdict; but ſentence was given upon his Plea, That he was ſued in the Arches for the ſame cauſe, and ſo they have not purſued their authority: for the Act is, That ſuch Commiſſioners ſhall have authority by vertue of the ſaid Act, and of the ſaid Letters Patents to exerciſe, &c. And they are directed by the Letters Patents, that they ſhall proceed upon due proof had by confeſſion or true witneſs, to give ſentence. Periam, Although they have not obſerved the due form preſcribed unto them by the Letters Patents; yet ſuch ſentence is not void. Anderſon, If the party appeareth and will not anſwer, it ſhall be taken pro confeſſo, and he ſhall be condemned.

*Trin.* 38 *Eliz.* In the Common Pleas.

## CCXVII. *Sir* John Sand's *and* Packſal-Brocas's *Caſe.*

SIR John Sands brought an Action upon the Caſe againſt Packſal Brocas, upon a Trover of goods and houſhold-ſtuff; The Defendant pleaded as to parcel, that they were fired to his Freehold in S. in Hampſhire, Abſque hoc, that he found them in other manner; as to the part, that the Plaintiff gave them to him at D. in Hampſhire, and as to the other part, he pleaded, Not guilty: For the firſt part, the Plaintiff cauſed it to be entred, Non vult ulterius proſequi, and took iſſue upon the two other; and it was found for the Plaintiff by ſeveral Juries, in ſeveral Counties, and damages and coſts aſſeſſed by the Juries: and now the Defendant brought Error, and aſſigned Error, i. becauſe the Plaintiff as to the firſt had entred, Non vult ulterius proſequi, which is a Non-ſuit, and Non-ſuit in part, is Non-ſuit in all. Anderſon, It is a Queſtion, if this be a Non-ſuit? The entry is, Querens venit, & gratis conceſſit, that as to the goods mentioned in the firſt Pleas, Non vult ulterius proſequi; Ideo, conſideratum eſt quod nihil de iiſdem verſus the Defendant ſiat, eſt ille & pleg. in miſeric. & the Defendant eat inde ſine die. Periam, A Non-ſuit is, when the Plaintiff is demanded and doth not appear; but when he comes into Court, and ſaith, Quod non vult ulterius proſequi, the ſame is a Retraxit: Nelſon, Prothonotary, Non-ſuit is upon default; but here the Plaintiff appears, and this is the uſual form of entry of a Retraxit. Another Error was aſſigned, becauſe both Juries have aſſeſſed coſts, and Judgment given according; whereas the laſt Verdict ought to do it. And where two Juries are to try the iſſue, the form of the entry after the firſt Verdict is, Ceſſet executio, untill the other iſſue be tryed: Vid. 21 H. 6. 31. 36 H. 6. 13. Anderſon, Several iſſues cannot ſever the coſts, although they may the damages, for it is but one ſuit; therefore but one coſts; and that is the reaſon that Judgment ſhall not be given untill the laſt iſſue be

tryed, becauſe that coſts ſhall be but once aſſeſſed, which was granted by the whole Court: And by Periam, The firſt Jury may aſſeſs coſts for the whole ſuit, Quod fuit conceſſum. Coke, Here are ſeveral Judgments for the coſts; and although it be void for the later iſſue, yet it is good for the firſt. Periam, How ſhall it appear unto us which Verdict was the firſt, and which the laſt? although that the one Verdict be entred of Record before the other, the ſame doth not make that it was firſt given; wherefore, the whole ſhall be reverſed.

## CCXVIII. *Mich.* 31 *Eliz.* In the Common Pleas.

2 Len. 224. A Man, 30 Eliz. made a Feoffment in Fee to the uſe of himſelf for life, and afterwards to the uſe of his firſt ſon, and his heirs; The father and the Feoffees before iſſue, for money, by Deed, give, grant, and enfeoff J. S. and his heirs, who hath not notice of the uſe; The Tenant for life hath iſſue, and dieth, the iſſue entreth: Glanvile, The uſe limited to the firſt ſon is deſtroyed; for without regreſs of the Feoffees, it cannot riſe; and that the ſame is gone by their Livery: See Plowden's Com. 340. And alſo he vouched the caſe of the Earl of Kent, whereby the releaſe of the ſurviving Feoffee, a ſleeping uſe was deſtroyed, and could not afterwards be revived. Harris, The uſe may riſe without entry of the Feoffees: And he put a difference between uſes created before the Statute and uſes created after; for in the firſt caſe, they ought to enter; and if they be diſabled by any Act, as in the caſe betwixt Gaſcoign and the Earl of Kent, they ſhall never riſe, but in the later caſe, all the authority and confidence is by the Statute out of the Feoffees, and the uſes contingent ſhall riſe without aid of the Feoffees by the operation of the Law; for the land is bound to the uſes, and charged with them: As upon a Recovery in a Warrantia Chartæ, the land of the Defendant is charged, pro loco & tempore; and according to the common experience in Conveyances for the payment of the Debts of the King: as in the caſe betwixt Breden and Dennis. The Debtor of the King makes a Feoffment in Fee to the uſe of himſelf and his heirs, untill he makes default of payment of ſuch a ſum unto the King at ſuch a day, and upon default, to the uſe of the King and his heirs. Cooper, There needs no entry of the Feoffees; and he put the difference put before by Harris, betwixt an uſe created before and an uſe created after the Statute: And now the Feoffees have not any power to revive or deſtroy ſuch caſes, but are onely as inſtruments to convey the uſes; for the uſe is created upon the Livery, and is transferred by the Statute, if the perſon to whom the uſe is limited be capable thereof at the time of the limitation thereof; but if not, the Law ſhall preſerve the ſame, and it cannot by any means be prevented. And he put the caſe of Bro. Feoff. to Uſes, 50. 30 H. 8. And there is a great difference betwixt an Uſe limited before the Statute and after the Statute; for now, after the Statute, the Feoffees have not any ſeiſin, whereof they may make a Feoffment: And he put the caſe between Cheney and Oxenbridge; Cheney leaſed to Oxenbridge for 60 years, and afterwards enfeoffed Oxenbridge to the uſe of the ſaid Cheney and his wife for their lives, with divers remainders over; and it was adjudged in the Court of Wards, that by that Feoffment the term was not extinct: And he put the caſe of the Lord Paget in the King's Bench adjudged. A Feoffment was made unto the uſe of the Feoffor for life, the remainder to him whom the Feoffor ſhould name at his death, in Fee; the Feoffor and the Feoffees for good conſideration, levied a Fine unto a ſtranger, and afterwards the Feoffor named one and died, the party named by the Feoffor ſhall have the land, notwithſtanding the Fine. Beamount, The contingent uſe here, is utterly deſtroyed by

by the Feoffment aforeſaid; and it appeareth by the preamble of the Act of 27 H. 8. That the makers of the Act did not favour Uſes, but their intent was utterly to extirpate Uſes: And if contingent Uſes which are not, nor cannot be excuſed by the Statute ſhould ſtand in force, The miſchief would be, That no purchaſor ſhould be ſecured and ſafe in his purchaſe, but ſhould always be in danger of a new born Uſe, not known before; and he grounded his farther argument upon the reaſon of Manwood and Dyer, Where a man makes a Feoffment in Fee to the uſe of himſelf and his Wife which ſhall be, and afterwards he and the Feoffees, and thoſe in remainder, make a Feoffment to divers new Feoffees, and to new Uſes; and afterwards he takes another Wife, and dieth: It was the opinion of the ſaid two Judges, That by that Feoffment, ut ſupra, the contingent Uſes are deſtroyed: For when the Eſtate which the Feoffees accept is taken away, which was the root and foundation of the Uſes which are the branches and fruit of the body of the ſaid Tree, it neceſſarily followeth, That they be alſo taken away; and becauſe the Feoffees by their Livery, are barred to enter to recontinue the Eſtate which ſhould yield ſuch Uſes, they alſo are gone and extinguiſhed. Yelverton was of opinion, that notwithſtanding the ſaid Feoffment, that the Uſe ſhould riſe in his due time according to the limitation of it. It was adjourned.

*Trin.* 30 *Eliz.* In the King's-Bench.

## CCXIX. *The Lord* North's *Caſe.*

THE Queen granted unto the Lord North and his heirs, the Fines, pro licentia concordandi, and one would not pay him the Fine; for which cauſe, the Lord North brought an Action upon the Caſe againſt him, and declared upon Indebitatus aſſumpſit, &c. Godfrey moved this matter to the Court, to know their opinion, if ſuch Action would lie for the matter or not. Fenner, For a Fine in a Court-Baron, or Court-Leet, debt lieth; but as he conceived, here this Action doth not lie, for it is a real Fine, and there is no contract betwixt the parties; but the ſame is given by the Law: and ſome were of opinion, that debt lieth for a relief, for there is a contract by Fealty. Gawdy conceived, That the Action doth well lie; for it is not any caſual profit and therefore debt lieth for it, although it be an inheritance: And ſee Dyer 28 H. 8. 24. The heir ſhall have an Action of Debt upon a Nomine pœnæ reſerved by his Anceſtour. Wray, I do not ſee that he hath any other remedy, and therefore I am of opinion that this Action will lie.

1 Leon. 249, 250. 3 Len. 56. 234.

*Trin.* 31 *Eliz.* In the Exchequer.

## CCXX. *Mrs.* Paſchall's *Caſe.*

MIſtreſs Paſchall was bound with ſureties, for her appearance before the high Commiſſioners, that ſhe ſhould not depart without licence under the hands of three of them; and ſhe pleaded the general Pardon at the laſt Parliament, in which there is an Exception of all Bonds and Recognizances, except onely ſuch Bonds and Recognizances as are for appearance: And Atkinſon argued, That ſhe ought to be diſcharged, by the Exception; for although the departure without licence be not ſpecially named, yet it is within the ſenſe; for the not departure without licence, is no other thing, than to continue her appearance. Popham contrary: For, The Non departure without licence, was ſet down in the Condition to this purpoſe, That ſhe ſhould

not go into the Countrey to be corrupted there, or to corrupt other, and receive Seminaries, &c. therefore it is another thing than appearance: Between Hore and Hare, the Case was, One was bound to make his appearance at such a day, and in the mean time thrice every Month to repair unto such a Preacher to be better informed in Religion, although the Non appearance was pardoned; yet the other point, i. the resorting to the Preacher, is to be answered. Atkinson, There the resorting to the Preacher is collateral, and a several point from the appearance: But in the Case at Bar, the not departure is pursuant to the appearance. And the opinion of all the Barons was, That the pardon did not extend to the same.

CCXXI. *Trin.* 31 *Eliz.* In the Common-Pleas.

1 Len. 205. AN Action was brought against an Executor, who pleaded, That he refused the Executorship, upon which the parties were at issue. The Bishop certified, Quod non recusavit, whereas in truth, he had refused before the Commissary of the Bishop. Fenner, Serjeant, moved to have the advice of the Court upon this matter, and argued, That the Court ought to write to the Commissary, which was denied by the Court, for he is not the Officer to this Court as to that purpose, but the Bishop himself is our Officer: and the party cannot have an Averment against the Certificate of the Bishop, no more than against the Return of the Sheriff: And the Court also held, That the onely remedy for the Defendant, was by an Action upon the Case against the Bishop for his false Certificate: But it was moved, That the issue joined upon the refusal, ought to be tried by the Countrey, and not by the Certificate of the Bishop; and such was the opinion of Windham and Walmsley: Periam, Where the issue is, that the Executor refused before such a day, or after, there the issue shall be tried by the Countrey; contrary, Where the issue is upon the refusal generally, for the refusal is before him as Judge, as also resignation is.

*Mich.* 28 and 29 *Eliz.* In the King's-Bench.

CCXXII. Giles's *Case.*

A Writ of Error was brought in the King's-Bench, to reverse a Judgment given in an Action upon the Case, in the Court of Common-Pleas; where the Writ brought against the Defendant there in that Case, was, Quare exaltavit stagnum per quod pratum of the Plaintiff was inundatum: The Defendant in the Action there pleaded, Not guilty, and the Jury found, That the Defendant Erexit stagnum; and they said, That if the Court shall judge, That Erectio and Exaltatio be all one, then they find, that the Defendant is guilty; and afterwards Judgment was given in the said Court of Common-Pleas for the Plaintiff: Whereupon this Writ of Error is brought. And Glanvile, Serjeant, who argued for the Plaintiff, in the Writ of Error alledged the general Error; viz. That Judgment was given for the Plaintiff, where it ought to be found for the Defendant: And he said, That Erigere stagnum est de novo facere, exaltare, is erectum majoris altitudinis facere, Deexaltare est ad pristinam altitudinem adducere: Prosternere stagnum, est penitus tollere: And in every Action upon the Case, such apt and precise words are to be in the Writ, according as his Case requires, unto the end that Judgment may in such Action be given to the Plaintiff according to his plaint, and his damages, In 7 E. 3. 56. In Assise

of

of Nuſans, Quare exaltavit ſtagnum ad nocumentum liberi tenementi ſui: The Defendant pleaded, that he had not inhanced it after it was levied; and there it was ſaid by Drew, Serjeant, That there is not any other Writ in the Chancery, but Quare exaltavit ſtagnum. But that was denied by Herle: For that he ſaid that the Plaintiff might have a Writ out of the Chancery, Quare levavit ſtagnum: And there by that Book it is aſſigned, That Levare ſtagnum, & exaltare ſtagnum do differ: and therefore he ſaid, that in this Caſe, the Writ ſhould abate for the uſing of one word for another, 8 E. 3. 21. Fitz. Nuſans 5. by Chauntrel, In a Writ of Nuſans, Quare levavit, if it be found that he levied it to the Nuſans, &c. the whole ſhall be deſtroyed; but in a Writ Quare exaltavit, nothing ſhall be pulled down, if it be found for the Plaintiff, but that which is enhaunced onely: So 8 Aſſ. 9. Br. Nuſans 17. the ſame Caſe is put. And ſee 16 E. 3. Fitz. Nuſans, 11. If the Nuſans be found in any other form than the Plaintiff hath declared, he ſhall not recover: And in 48 E. 3. 27. the Writ was, Quare divertit curſum aquæ, &c. and the Plaintiff ſhewed, that the Defendant had ſet piles, and ſuch other things in the water, by reaſon whereof the courſe of the water was ſtraitened; and becauſe the Plaintiff might have had a Writ; Quare coarctavit curſum aquæ, the Writ was abated: Another Exception was taken, viz. That the Aſſiſe of Nuſans ought to be brought againſt the Tenant of the Freehold, and therefore it would not lie in this Caſe; it not being ſhewed that the Defendant was Tenant of the ſoil: Vid. 33 H. 6. 26. by Moile, If a way be ſtraitned and impaired, an Action upon the Caſe lieth; but if it be altogether ſtopped up, then an Aſſiſe muſt be brought; But there it is ſaid by Priſoit, That if the ſtopping up of the way be done by the Tenant of the Land, then an Aſſiſe lieth; if by a ſtranger, then an Action upon the Caſe: But for common Nuſances no Action lieth, but they ought to be preſented in the Court-Leet or Turn, and there reſtreſſed: and ſuch was the opinion of the whole Court in this Caſe. Then it was moved, That one of the Plaintiffs in the Writ of Error had releaſed; and the Queſtion was, whether that releaſe ſhould bar his companion? to which nothing was ſaid: At another day the Caſe was moved again, and Drew, Serjeant, ſaid, That Exaltare and Erigere, are all one; but all the Juſtices were againſt that; for that Erigere is de novo facere, and Exaltare is in majorem altitudinem attollere, and afterwards judgment was affirmed. 6 Co. 25.

*Trin.* 30 *Eliz.* In the King's-Bench.

## CCXXIII. Freeman *and* Drew's *Caſe.*

IN an Action upon the Caſe by Freeman againſt Drew, The Defendant pleaded, That after the Aſſumpſit whereof the Plaintiff had declared, There was an agreement betwixt them, That the Defendant and two others ſhould be bound in a Bond to the Plaintiff for the ſum promiſed; and that they entred Bond accordingly: The Plaintiff confeſſed the agreement, and that the Bond was made according to the agreement, and that the parties bound did deliver the ſame as their Deed, cuidam ignoto, to the Plaintiff; The Defendant ſaid, That they did deliver the Deed to one J. S. and gave notice thereof unto the ſervant of the Plaintiff, and that they are now ready to deliver it to the Plaintiff, upon which there was a Demurrer: Godfrey argued, That the ſaid Plea of the agreement ſpecially executed, ut ſupra, was good, as in a Caſe lately adjudged between Alford and Leigh, Tr. 29 Eliz. Where the Arbitrament was made, That Leigh ſhould releaſe unto Alford before the Feaſt Petri ad vincula, and before the ſaid Feaſt, Leigh ſealed and delivered ſuch a releaſe unto the uſe of the ſaid Alford, and 1 Cro. 54. Ante 110.

and after the Feaſt, he tendred it to Alford, but he refuſed it, and brought Debt upon the Bond for performance of the Arbitrament; and it was adjudged, That the Action would not lie; for if he do recover upon that Action, he alſo ſhould take advantage of the releaſe. Coke, In Alford's Caſe, a tender was to the Plaintiff himſelf, which is not in this Caſe; and although that it was after the Feaſt, yet it was before the ſuit commenced, and alſo in our Caſe the tender is depending the ſuit. Gawdy, If the Plaintiff ſhould recover in this Action, he might plead the recovery in Bar of the ſuit upon the Obligation. Wray, Let the Plaintiff releaſe the Bond, and take Judgment here, which was done accordingly.

32 *Eliz.* In the Common-Pleas.

## CCXXIV. Somers *and Sir* Richard Buckley's *Caſe*.

IN the Caſe betwixt Somers and Sir Rich. Buckley; Where the Plaintiff prayed a Prohibition to the Court of Admiralty; The Caſe was, That the Defendant ſued in the Admiral Court for the moyety of a
2 Inſt. 205. Ship and prize taken by them upon Letters of Repriſal; for the Civil Law is, That if two Ships meet at Sea together, although they do not go forth as conſorts, and the one Ship in the preſence of the other taketh a Ship with goods in it, the other Ship which was preſent ſhall
2 Roll. 205. have the moyety, or one half of the Ship and goods taken; for although it did not take the Ship, yet the preſence thereof there at the time of the taking, was a terrour to the other Ship which was taken, Sine quo, the other Ship could not be ſo eaſily taken: And now the Plaintiff for the Prohibition did ſurmiſe, That after they were arri-
2 Roll. 171. ved in England, they did agree amongſt themſelves, That the Plaintiff ſhould have four parts of the ſaid Ship and goods ſo taken, and the other five parts: And the Plaintiff ſaid, that he had pleaded this matter in the Court of Admiralty, and they would not allow the Plea, and thereupon he prayed a Prohibition, which was granted; but afterwards it was moved on the other ſide, That the ſaid Court of Admiralty would allow the Plea, and there trie it; and thereupon a conditional conſultation was granted by the Court; ſo that that Court allow that Plea, and trie it there: And it was ſaid, If the Court there ſhould not allow the Plea, that they ſhould incur the offence of contempt of this Court, and the other party ſhould have a Prohibition.

*Mich.* 32 *Eliz.* In the King's-Bench.

## CCXXV. *Sir* Richard Buckley's *Caſe*.

SIR Richard Buckley was indicted upon the Statute of Præmunire of 13 and 15 R. 2. and the effect was, That whereas one Griffeth Matthew had murthered one Robert Footman at Beaumarris; and whereas one Owen Wood proſecuted the ſaid Griffeth Matthew for the ſaid murther; The ſaid Griffeth Matthew, Præmiſſorum non ignarus, ſed intendens, the ſaid murther, a Curia Dominæ Reginæ ad aliud examen, &c. pro quodam ſuppoſito contemptu Curiæ Admiralitatis traxit in placitum: the ſaid Owen Wood, coram Julio Cæſar. in the Court of Admiralty holden at Iſlington, ſuppoſing the ſaid murther to be done upon the high Sea, and thereupon cauſed him to be arreſted, and being under arreſt, to enter Bond unto the Lord Admiral, that he ſhould not proſecute the ſaid murther againſt the ſaid Griffeth Matthew, nor examine any witneſſes concerning the ſaid murther, and that the ſaid Sir Richard Buckley

was

was abettor and procurator of the said Griff. Mathew therein. To this Indictment many Exceptions were taken by Coke: 1 In placitum pro quodam contemptu, and doth not shew the contempt in certain; for it is too general, and so not good: See 18 Ass. for the stealing of certain Sheep, without shewing what Sheep they were, is not a good Indictment. And here he doth not say; concerning the said murther, or concerning the premisses: 2 Although that the matter of the Indictment be true; yet the Stat. of Præmunire doth not extend to it, for the Statute inflicts a punishment as well upon the Judge, (scil.) the Admiral, as upon the party: See 10 H. 4. 164. If one Libelleth in the Court of Admiralty for a thing done upon the Land, and it appeareth upon the Libel, that the thing was done upon the Land, and they, notwithstanding that hold Plea of it; A Præmunire lieth upon it. But if the same doth not appear within the Libel, then it is not within the Statute; but a Prohibition shall onely issue: So in the case of Tithes; If the Parson sueth for Tithes severed from the nine parts, and that appeareth in the Libel, the same suit is within the Statute of Præmunire; and that was Cardinal Woolsey's Case: 3 It is alledged, That Sir Richard Buckley procured him to do it, but it is not shewed any place where the procurement was had: And that was resolved in the Case of the Lord Paget, and the Bishop of Coventrey and Lichfield: where the Bishop was indicted, That he commanded J. S. to enter into the Close of the Lord Paget, and to do a trespass there, and because the place of the commandment was not set forth in the Indictment, the Bishop was discharged. M. 25 and 26 Eliz. Another matter was objected, because that the words are, That the said Sir Richard Buckley did abet and procure, in hac parte; without shewing what thing. As to this last Objection, The Court was of opinion, that the words (in hac parte) did refer to the whole offence contained in the Indictment 2. Wray. It is hard, That the matter of the Indictment should be within the Statute of Præmunire; for by the suit it is supposed, That the offence was done upon the sea; and the Admiral hath jurisdiction to punish murthers committed upon the sea, so in some degree the Admiral hath Conusance to enquire of Murther; but if they hold plea of any thing of which in no degree they have Conusance, it is otherwise. And as to the place where the commandment was made, the Court was clear of opinion, that it ought to be shewed.

1 Len. 5.

*Mich.* 32 *Eliz.* In the King's Bench.

## CCXXVI. Hooper's *Case.*

JOhn Hooper, alias Bartholomew of D. &c. was indicted upon the Statute of 8 H. 6. Of forcible Entry, and Exception was taken to the Indictment in default of addition of the place, &c. For the addition is here after the alias dict. and so there is no addition; and therefore the party was discharged, and it was holden in this Case, That Uxor is a good addition; and where the husband and wife are indicted, and the husband be indicted of such a place, although the wife hath no addition of place, yet the same is good enough; but Ive said, That in that case there needs not any place.

1 Cro. 198.

## CCXXVII. *Mich.* 32 *Eliz.* In the King's Bench.

A Was Indicted for not repairing of a Bridge lying in such a highway, which A. is bound to repair by reason of his land adjoyning; and the Indictment was, That the Bridge was so ruinous, Ita quod

Ligei

Ligei Dominæ Reginæ per eam tranſire non poſſunt, and concluded, ad nocumentum eorund. &c. and that was challenged, becauſe it doth not ſay, Ad nocumentum omnium ſubditorum: for otherwiſe it may be intended a private way, of which a man cannot be indicted, but the party grieved ſhall have his Action upon the Caſe: But the Exception was not allowed, but the Indictment is good enough; For the words of the Indictment are, Sic quod Ligei Dominæ Reginæ illuc pertranſire non poſſunt; i. e. all the Liege people and Subjects of the Queen; and then, ad nocument. eorund. amounts to as much as, ad commune nocumentum, &c. and for that cauſe the Indictment was holden good enough.

*Mich.* 32 *Eliz.* In the King's Bench.

## CCXXVIII. Aſhpernon's *Caſe.*

ONE Aſhpernon was Indicted at the Seſſions, in the County of Suſſex, for an unlawfull aſſembly and entry into the Cloſe of one A. called, The Parſonage land, before two Juſtices of Peace there, and exception was taken to it, becauſe it is not ſet down in the Indictment, that one of the Juſtices was of the Quorum, but that the exception was diſallowed, for the Indictment is ſufficient, if none of them be of the Quorum, for they may enquire, but not determine: Another exception was, becauſe the contents of the Cloſe is not ſet down in the Indictment; (ſcil.) the number of the acres, nor if it be arrable, paſture, or Meadow; but that was diſallowed alſo; for this is but an Indictment of treſpaſs, contrary, it is upon an Indictment upon the Statute of 8 H. 6. for there the party grieved is to have reſtitution, but ſo he is not here: Another exception was taken, becauſe that in the Indictment no time is ſet down when the treſpaſs was done, but only of the aſſembly; but that was diſallowed alſo; for both ſhall be taken to be done together all at one time.

Poſtea 186.

*Mich.* 32 *Eliz.* In the King's Bench.

## CCXXIX. Leveret *and* Townſend's *Caſe.*

1 Cro. 198. 3 Len. 263.

IN an Action upon the Caſe, for diſturbing him of his common; The Plaintiff declared, That he was ſeiſed in Fee of a Meſſuage and certain land, and that he, and all thoſe whoſe Eſtate, &c. have common of paſture in 16 acres of land called D. from the time that the corn was reaped, untill it be ſowed again; and alſo common of paſture in lands, called R. omni tempore anni, as appendant to the ſaid Meſſuage and land: and that the Defendant had plowed the ſaid lands, and ſo diſturbed him of his common, and found for the Plaintiff, and it was moved in ſtay of Judgment, That here it appeareth, that the Plaintiff was ſeiſed in Fee, and ſo he ought to have an Aſſize, and not an action upon the Caſe; but the exception was diſallowed per Curiam, See 2 H. 4. 11. 8 Eliz. Dyer, 250. 11 H. 2. Action upon the Caſe, 36.

*Mich.* 32 *Eliz.* In the King's Bench.

## CCXXX. Hore *and* Wridleſworth's *Caſe.*

HOre brought an Action of treſpaſs againſt Wridleſworth, Quare clauſum & domum ſuam fregit. The Defendant pleaded, and put the Plaintiff to a new aſſignment: i. a Houſe called a Stable, a Barn, and another

another houſe called a Carthouſe and Garner, and that was aſſigned for Error, for that Aſſignment is not warranted by the Declaration. Gawdy, The ſame is good enough; for Domus in the Declaration, contains all things contained in the new Aſſignment. But if the Declaration had been of a Cloſe, and the new Aſſignment of a Barn, it had not been good. Wray, Domus eſt nomen collectivum, and contains many buildings, as Barns, Stables, &c. and ſo was the opinion of the whole Court.

*Mich.* 32 *Eliz.* In the King's Bench.

## CCXXXI. Savacre's *Caſe.*

A Writ of Error, was brought by Savacre and the Biſhop of Glouceſter, M. 31 and 32 Eliz. upon a Judgment given in a Quare Impedit, for the Queen. And Error aſſigned: 1. An Attachment was awarded againſt the Defendant in the Quare Impedit; returnable Quind. Paſch. at which Savacre appeared, and caſt an Eſſoin; and notwithſtanding that, a Diſtringas was awarded againſt them both, returned, Craſt. Trin. and the awarding the Diſtringas was erronious; for the Eſſoin was as an appearance for to ſave, &c. and therefore againſt him no Diſtringas ought to have been awarded: And upon alledging of Diminution, the Record of the Eſſoin was certified; for the ſame did not appear upon the Plea Roll. 2 The Record is, Ipſi in Miſericord. and ſo both of the Defendants are amerced for the default of appearance, Quind. Paſch. whereas Savacre was then Eſſoined, and ſo no cauſe of amerciment of him. Coke, The original Writ was here ſued, Mic. 26 Eliz. returnable Quind. Hillar. and then both the Defendants made default, for which an Attachment was awarded returnable, 15 Paſ. and then Savacre appeared, and Judgment was given, Quod ipſi ſint in Miſericord. in which point the Error is aſſigned: But I conceive, that it is not Error; for upon the Attachment, the parties ought to put in ſureties for their appearance: and the ſaid ſureties took upon them, that the Defendants, and each of them ſhould appear, and if they, or one of them maketh default, the ſureties ſhould be amerced; and ſo here, this Judgment, Ideo ipſi in Miſericord. ſhall refer to the ſureties, not to the parties: for the Defendants ſhall not be amerced untill the end of the ſuit, and but once onely in one action, which ſee, Book of Entries, 464. where there was but one Defendant; and therefore, If the amerciment ſhall refer to the Defendant, then it ſhould be, Ideo ipſe, not ipſi, &c. and that is the reaſon, wherefore neither the Queen nor an Infant ſhall find pledges, for no amerciament ſhall be upon their default, therefore in vain for them to find pledges, &c. And if the pledges be amerced where they ought not to be amerced by the Law, yet the Defendant ſhall not have Error upon it, for he is not the party grieved by that amerciament. And upon this reaſon it is, That in a Scire facias againſt the bail, if erronious Judgment be given againſt him, the Defendant in the Action ſhall not have a Writ of Error. The awarding of the Diſtreſs upon the Roll againſt both, where the one of them onely makes default, is not error, eſpecially as this caſe is; for though that one of them was Eſſoined untill the day aforeſaid, yet at the ſaid day they make default, and ſo the Diſtreſs is well awarded againſt him; and although that the Writ were ill awarded; yet when they appear, Cr. Trinit. at the day of the return of the Diſtreſs, all mean defaults in the Proceſs are ſaved, and ſo the miſawarding of the Diſtreſs, by appearance afterwards is ſupplyed: As 39 E. 3. 7. The Law requires that in an action grounded upon the Statute of Præmunire, 27 E. 3. the Defendant hath warning by two Months; yet if the Defendant having not had ſuch warning appeareth, the Proceſs is well enough: So 9 E. 4. 18. Where, upon any Proceſs

Ante 4.

Process the Defendant appeareth, although the day of appearance be not lawfull, yet the parties shall be put to answer: and see many cases there to the same purpose: and such was the opinion of the Court in the principal Case. And as to the second Error, that the Judgment, Ideo ipsi in Miseric. shall be referred to the sureties onely, and not unto the party: and that the Defendant shall be but once amerced in one action, the same is true, that he shall be but once amerced for one default; but if many defaults be, the Defendant shall be severally amerced for every default: And it should be unreasonable that the sureties should be amerced, and that the Defendant who is as principal should go free: See the Book of Entries, 193. Ipsi & plegii sui in Misericordia, &c.

*Mich.* 32 *Eliz.* In the King's-Bench. A

## CCXXXII. Farnam's *Case.*

FArnam, Schoolmaster, and others, were Indicted upon the Statute of 8 H. 6. for entring, In domum Rectoriæ de Putney, ac in cert. terras eidem domui part. jacen. in Putney, &c. Exception was taken to the Indictment, because it recited the two parts of the Statute; 1. Expulsion and Disseisin with force: 2 Holding out; and there is not any offence in it contained as to one of them; (scil.) Holding out; and although it was not necessary to recite the Statute, yet the party meddles with it, and doth not apply it to the special matter, the same is naught: See for that the Case between Strange and Partridge, Plow. Com. 2 The entry is supposed, In domum & certas terras eidem domui pertinen. jacen. in Putney; which is incertain, as to the lands, and it is naught for the house also; for it is not shewed in what Town the house is, for this clause, ac certas terras eidem domui pertin. jacen. in Putney, is a distinct clause by it self, and refers onely to the lands, and doth not extend to the house: As to the first exception, it was disallowed; for it is not like unto Partridge's Case, for there the Statute is recited, which needs not, and therefore, being misrecited, made the Indictment insufficient; but here the Statute is well recited, and therefore as unto that matter, the Indictment is sufficient: As to the second exception, the Justices were of opinion, That the Indictment in that
Antea 184.
respect, was too general and incertain: The third exception was not allowed; for the latter words, i. e. in Putney, do refer to the whole, and extend as well unto the house as unto the lands: But as to these words, Lands to the said house belonging. See the Case between Partridge and Croker, 7 E. 6. 85. where it is good enough, because that the number of the acres is set incertain. And it was holden by the Court, That a Schoolmaster is a good addition, for it is a mystery, as a Scribener; and afterward the Indictment for the house onely was holden good.

*Mich.* 32 *Eliz.* In the Chancery.

## CCXXXIII. Gray *a Bencher of the* Temple's *Case.*

GRay, a Bencher of the Temple's Case, was this; It was found by Office, That one H. was seised in Fee of certain lands called Drayners, and Codred, alias Codreth, in the County of Hertford, in his Demesne as of Fee, and thereof enfeoffed certain persons, unto the use of himself, and Anne Capel, with whom he afterwards intermarried, and of the heirs of their two bodies begotten, and of such Estate died seised

ſeiſed; and farther it was found, that the ſaid H. was alſo ſeiſed of other Lands, in Barmeſden in his Demeſne as of Fee, and therefore died ſeiſed; and now came Gray into the Chancery, and ſhewed that the ſaid H. was ſeiſed of the ſaid Land, called Drayners, in his Demeſne as of Fee, and thereof enfeoffed certain perſons unto the uſe of himſelf, and the ſaid Anne Capel, for the term of their lives, and afterwards, by his Indenture, dated the 23. of Decemb. and enrolled, bargained and ſold the Reverſion thereof to the ſaid Gray, &c. by force whereof, &c. Abſque hoc, that he was ſeiſed in tail, and abſque hoc, that he thereof died ſeiſed in his Demeſne, as of Fee-tail, as it is found by the ſaid Office: and for the Land in Barmeſden, he ſaid, that the Lady Judde was ſeiſed thereof for the term of her life, the Reverſion to the ſaid H. in Fee, who granted to him the ſaid Reverſion in Fee, &c. abſque hoc, that he died ſeiſed in his Demeſne as of Fee, &c. And upon that, the Queen's Attorney joined iſſue, and the Venire facias iſſued, De Cottred & Barmeſden; and the Jury found, That H. did not make the Feoffment to the uſe of himſelf and Anne his Wife in tail; and farther found for Gray in all, &c. And it was objected here, That the ſame is not a good and lawfull trial: For the Land is alledged to be in Codrett, and the Venire facias is of Codred, &c. And although the Venire facias be well awarded, as unto Barmeſden, yet being naught in part, it is naught in all, which was granted by the whole Court; And then a new Venire facias ſhall iſſue forth for the whole. Another Objection was, becauſe he pleads that the Lady Judde was ſeiſed of that Land for the term of her life, in which Caſe Gray, who is in Reverſion, ought not to be admitted to this Traverſe, becauſe that Tenant for life, for any thing that is pleaded to the contrary, is yet alive; and it is clear, that none ſhall be put to his Traverſe, but the party grieved; and here he in the Reverſion upon an Eſtate for life, cannot be reſtored to the poſſeſſion, and by conſequence ſhall not have Traverſe: See for that, 6 H. 7. 15. and 37. Aſſ. 11. &c. 2. The ſeiſin in tail ought to be traverſed, and not the deſcent, or dying ſeiſed; for if they were ſeiſed and diſſeiſed, and ſo dies, the Queen ſhall have the Ward. Coke, contrary, For Codred and Cottered, idem ſonant, &c. And although that it be found by Office, that H. was ſeiſed of Lands in Codred, alias Codreth, yet the Defendant ſupplies the ſaid matter; for he ſaith thus as unto the Land in Codred prædicta; which words import that the ſaid Land was known by the one name or the other; for this word prædicta, is as an Averment: which ſee 33 H. 8. Br. Averm. 42. And ſo here, this word prædicta is an Averment, that Cottered and Codred are one: And if ſo, then the Venire facias is well awarded. The Statute of 18 H. 6. gives Traverſe to thoſe who find themſelves grieved by ſuch Offices, or which are put out of their Lands or Tenements; and we are within the words of it, for upon the whole matter, we are out of poſſeſſion, as it was ruled in the Caſe of one Strukely in the Court of Wards the laſt Term. If it be found by Office, That A. died ſeiſed of my Manor, and that he held the ſaid Manor of the Queen: Now I am out of poſſeſſion; and for that cauſe, the bargain and ſale of Dorrel to Sir Francis Walſingham was holden void by the whole Court: And 4 H. 6. 12. Traverſe is given in lieu of Petition; but he in the reverſion may have Petition, therefore he ſhall be alſo admitted to Traverſe: and this Caſe may be reſembled to the Caſe of 2 E. 3. 23. where a Præcipe was brought againſt Tenant for life, and he in the Reverſion for life prayed to be received: It was ſaid by Thorp, That is not within the Caſe of the Statute, for he is Tenant onely in the Remainder, and it is poſſible that neither ſhall have any thing; and the Statute ſpeaks onely of Reverſion: and yet it was awarded, That he ſhould be received, otherwiſe great prejudice would follow. And here we are at prejudice; for now, by reaſon of this Office, we cannot have our Action of Waſte: Alſo here we need not to

Proces the Defendant appeareth, although the day of appearance be not lawfull, yet the parties shall be put to answer: and see many cases there to the same purpose: and such was the opinion of the Court in the principal Case. And as to the second Error, that the Judgment, Ideo ipsi in Miseric. shall be referred to the sureties onely, and not unto the party; and that the Defendant shall be but once amerced in one action, the same is true, that he shall be but once amerced for one default; but if many defaults be, the Defendant shall be severally amerced for every default: And it should be unreasonable that the sureties should be amerced, and that the Defendant who is as principal should go free: See the Book of Entries, 193. Ipsi & plegii sui in Misericordia, &c.

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## CCXXXIII. Gray *a Bencher of the* Temple's *Case.*

GRay, a Bencher of the Temple's Case, was this; It was found by Office, That one H. was seised in Fee of certain lands called Drayners, and Codred, alias Codreth, in the County of Hertford, in his Demesne as of Fee, and thereof enfeoffed certain persons, unto the use of himself, and Anne Capel, with whom he afterwards intermarried, and of the heirs of their two bodies begotten, and of such Estate died seised

ſeiſed; and farther it was found, that the ſaid H. was alſo ſeiſed of other Lands, in Barmeſden in his Demeſne as of Fee, and thereſore died ſeiſed; and now came Gray into the Chancery, and ſhewed that the ſaid H. was ſeiſed of the ſaid Land, called Drayners, in his Demeſne as of Fee, and thereof enfeoffed certain perſons unto the uſe of himſelf, and the ſaid Anne Capel, for the term of their lives, and afterwards, by his Indenture, dated the 23. of Decemb. and enrolled, bargained and ſold the Reverſion thereof to the ſaid Gray, &c. by force whereof, &c. Abſque hoc, that he was ſeiſed in tail, and abſque hoc, that he thereof died ſeiſed in his Demeſne, as of Fee-tail, as it is found by the ſaid Office: and for the Land in Barmeſden, he ſaid, that the Lady Judde was ſeiſed thereof for the term of her life, the Reverſion to the ſaid H. in Fee, who granted to him the ſaid Reverſion in Fee, &c. abſque hoc, that he died ſeiſed in his Demeſne as of Fee, &c. And upon that, the Queen's Attorney joined iſſue, and the Venire facias iſſued, De Cottred & Barmeſden; and the Jury found, That H. did not make the Feoffment to the uſe of himſelf and Anne his Wife in tail; and farther found for Gray in all, &c. And it was objected here, That the ſame is not a good and lawfull trial: For the Land is alledged to be in Codrett, and the Venire facias is of Codred, &c. And although the Venire facias be well awarded, as unto Barmeſden, yet being naught in part, it is naught in all, which was granted by the whole Court; And then a new Venire facias ſhall iſſue forth for the whole. Another Objection was, becauſe he pleads that the Lady Judde was ſeiſed of that Land for the term of her life, in which Caſe Gray, who is in Reverſion, ought not to be admitted to this Traverſe, becauſe that Tenant for life, for any thing that is pleaded to the contrary, is yet alive; and it is clear, that none ſhall be put to his Traverſe, but the party grieved; and here he in the Reverſion upon an Eſtate for life, cannot be reſtored to the poſſeſſion, and by conſequence ſhall not have Traverſe: See for that, 6 H. 7. 15. and 37. Aſſ. 11. &c. 2. The ſeiſin in tail ought to be traverſed, and not the deſcent, or dying ſeiſed; for if they were ſeiſed and diſſeiſed, and ſo died, the Queen ſhall have the Ward. Coke, contrary, For Codred and Cottered, idem ſonant, &c. And although that it be found by Office, that H. was ſeiſed of Lands in Codred, alias Codreth, yet the Defendant ſupplies the ſaid matter; for he ſaith thus as unto the Land in Codred prædicta; which words impoꝛt that the ſaid Land was known by the one name or the other; for this word prædicta, is as an Averment: which ſee 33 H. 8. Br. Averm. 42. And ſo here, this word prædicta is an Averment, that Cottered and Codred are one: And if ſo, then the Venire facias is well awarded. The Statute of 18 H. 6. gives Traverſe to thoſe who find themſelves grieved by ſuch Offices, or which are put out of their Lands or Tenements; and we are within the words of it, for upon the whole matter, we are out of poſſeſſion, as it was ruled in the Caſe of one Strukely in the Court of Wards the laſt Term. If it be found by Office, That A. died ſeiſed of my Manor, and that he held the ſaid Manor of the Queen: Now I am out of poſſeſſion, and for that cauſe, the bargain and ſale of Dorrel to Sir Francis Walſingham was holden void by the whole Court: And 4 H. 6. 12. Traverſe is given in lieu of Petition; but he in the reverſion may have Petition, therefore he ſhall be alſo admitted to Traverſe: and this Caſe may be reſembled to the Caſe of 2 E. 3. 23. where a Præcipe was brought againſt Tenant for life, and he in the Reverſion for life prayed to be received: It was ſaid by Thorp, That is not within the Caſe of the Statute, for he is Tenant onely in the Remainder, and it is poſſible that neither ſhall have any thing; and the Statute ſpeaks onely of Reverſion: and yet it was awarded, That he ſhould be received, otherwiſe great prejudice would follow. And here we are at prejudice; for now, by reaſon of this Office, we cannot have our Action of Waſte: Alſo here we need not to

Traverſe the dying ſeiſed in tail, but it is ſufficient to Traverſe the gift in tail; for if there be not a gift in tail it is not poſſible that he ſhould die ſeiſed in tail, which ſee 2 E. 4. 15. by Laicon. Gawdy, Juſtice, conceived, that the trial is not good; for the Venire facias is not from the place where the Land is; and this word (prædicta) doth not amount to an Averment; and the Caſe cited before is but the opinion of Brook. Wray ſaid, That as to the firſt exception, that it was good enough, for both the names, idem ſonant; and as to the Office, by that the Queen hath gained poſſeſſion; ſo as he who traverſeth cannot have an Action of Waſte: and ſo he is prejudiced by the Office, &c.

*Mich.* 32 *Eliz.* In the King's-Bench.

## CCXXXIV. Perchall's *Caſe.*

PErchall was Indicted upon the Statute of 5 E. 6. cap. 4. for drawing of his Dagger in the Church, againſt J. S. without ſaying, That he drawed it to the intent to ſtick the Plaintiff, and therefore the Indictment was holden void as to the Statute; and it was moved, If it ſhould not be a good Indictment for the aſſault, ſo as he might be fined for it? and by Sands, Clerk of the Crown, and the whole Court, The Indictment is void for the whole; for the concluſion of the Indictment is, contra formam Statuti, and there the Jury cannot enquire at the Common Law.

*Mich.* 32 *Eliz.* In the King's-Bench.

## CCXXXV. Mead *and* Cheney's *Caſe.*

MEad brought an Action of Debt upon a Bond againſt Cheney, Executor of one Skipwith, and recovered; and upon a Fieri facias, the Sheriff did return Devaſtavit: and it was moved to have an Elegit, and the Juſtices would adviſe of it: and afterwards, at another day, a Precedent was ſhewed to the Court of 17 Eliz. and thereupon the Elegit was granted.

*Trin.* 32 *Eliz.* In the King's-Bench. *Rot.* 910.

## CCXXXVI. Tompſon *and* Trafford's *Caſe.*

Poph. 8, 9. IN an Ejectione firmæ, the Caſe was, That the Warden and Fellows of New College in Oxford, 8 Eliz. leaſed a Manſion houſe in the Burrough of Southwark, to one Standiſh, for 21 years, and afterwards, 25 Octob. 21 Eliz. they demiſed the ſame Manſion houſe to the ſaid Standiſh for 21 years, to commence the Michaelmas after: And the Stat. of 14 Eliz. cap. 11. and 18 Eliz. cap. 11. were alſo found: And if this ſecond Leaſe ſhall be ſaid a Leaſe in Reverſion, and ſo be void by the Statute of 14 Eliz. was the Queſtion. Foſter moved, That it is a Leaſe in Reverſion; for the firſt Leaſe doth continue untill Michaelmas; and ſo was the opinion of the Juſtices of Aſſiſe at the trial. Towſe contrary: For when Standiſh accepteth the ſecond Leaſe, the ſame is preſently a ſurrender of the former Leaſe; for he giveth power unto the Leſſor for to contract for the houſe preſently; and to that purpoſe he cited Corbet's Caſe, 8 Eliz. Coke, It is a ſurrender preſently, for you cannot apportion the Term. It was adjourned.

*Mich.*

*Mich.* 32 *Eliz.* In the King's-Bench.

## CCXXXVII. Wood *and* Avery's *Caſe.*

DEBT upon a Bond by Wood againſt Avery; the Condition was, That where the Plaintiff had demiſed to the Defendant for term of years, two Meſſuages, &c. If the Defendant at all times, during the term, ſhall maintain, ſuſtain and repair the ſaid two Meſſuages with good and ſufficient reparations, that then, &c. And the Defendant pleaded, That he had performed the Conditions in all, but as to one Kitchin, which was ſo ruinous at the time of the Demiſe, that he could not maintain or repair, and therefore he took it down, and rebuilt it again, in ſo ſhort a time as he could poſſible, in the ſame place, ſo large, and ſo ſufficient in breadth, length and height as the other Kitchin was; and that the ſaid Kitchin all times after the re-edifying of it, he had ſuſtained and maintained, and well repaired, and demanded Judgment, &c. upon which Plea the Plaintiff did demurr in Law; and by the Court, the Plea were a good Plea if it were in an Action of Waſte, but here where he hath by his own Act tied himſelf to an inconvenience, he ought at his perill to provide for it: And here it was ſaid, That if the Condition be impoſſible the Bond is ſingle: contrary, where a man is charged by an Act in Law.

*Mich.* 32 *Eliz.* In the Common-Pleas.

## CCXXXVIII. Boſtwick *and* Boſtwick's *Caſe.*

DOrothy Boſtwick brought Dower againſt Boſtwick an Infant, and the Caſe was, That the Husband of the Demandant was ſeiſed of certain Lands holden by Knight's-ſervice of M. C. and by his laſt Will, deviſed two parts of the Premiſſes to his Executors, during the non-age of his heir, and died, his heir within age; after whoſe death M. C. entred into the third part, deſcended as Guardian in Knight's-ſervice, and the Executors into the other two parts, upon which the Demandant brought one Writ of Dower againſt the Guardian, to be endowed of the third part; and another Writ of Dower againſt the heir within age, in whom the Freehold of the two parts was; The heir appearing by Attorney, pleaded to iſſue, which was found for the Demandant; but the Judgment was afterwards reverſed, becauſe the heir, being within age, did not appear by Guardian but by Attorney; for which cauſe ſhe again brought a Writ of Dower againſt the heir, and the Sheriff did return him ſummoned, but the heir made default; for which cauſe the Court was moved in the behalf of the Demandant, to have the aid of the Court in this Caſe: for if upon default of the Tenant, a Grand Cape ſhould iſſue forth, and ſo a Recovery by default ſhould follow; the ſame would be Error: which ſee 6 H. 8. Br. Liver. Defaul. 50. And therefore it was prayed, that ſome perſon be appointed Guardian to the heir, who may appear and plead for him, otherwiſe the Demandant is at great miſchief; for the Guardian now will not ſuffer the heir to appear in perſon: And if the Widow now Demandant ſhould ſtay for her Dower untill the heir ſhould come of full age, it would be a great miſchief: But by Walmeſley, Periam and Windham, We cannot appoint a Guardian to the heir for his appearance here, unleſs the heir be here in perſon in Court before us; and he was appointed to be brought in perſon into Court. Ante 59.

*Mich.*

*Mich.* 32 *Eliz.* In the Common-Pleas.

## CCXXXIX. *Sir* Anthony Denny's *Caſe.*

SIR Anthony Denny, ſeiſed in Fee of the Manor of Cheſſam, extending into Cheſſam, and in the Town of Hertford, and alſo of other Lands in Hertford, by his laſt Will, deviſed the Manor of Cheſſam to Henry Denny his ſon and heir in tail; and his Lands in Hertford, to Edward Denny his younger ſon, &c. It was holden by Walmſley, Periam and Windham, (abſent. Anderſon) That the younger ſon ſhould have that part of the Manor of Cheſſam, which lieth in the Town of Hertford. Another point in the Caſe was, That upon the death of Sir Anthony, an Office was found without any mention of this Deviſe; for which cauſe, the Queen ſeiſed, and leaſed all the Lands to deviſed to a ſtranger, during the minority of the heir; The heir comes of full age, and hath Livery of the whole, and without any entry, leaſeth the Lands for years, rendring Rent; the Leſſee entreth, and payeth the Rent to the heir, the heir dieth, the Leſſee aſſigns over his term, and the Rent is yearly paid to the right heir of Sir Anthony: And now Edward Denny entred, and per Curiam his entry is lawfull; for if the heir entreth in this Caſe, and many deſcents follow, yet the Deviſee may enter at any time, for his entry doth not make any abatement or wrong, but may well ſtand with the Deviſe; for if the Deviſe be waved, or the
1 Inſt. 111. a. 240. b. Deviſe doth defer the execution of the Deviſee; it is reaſon that the
3 Cro. 145. Ow. 86, 87. heir enter and take the profits, untill the Deviſee entreth: But if a ſtranger abateth after the death of the Deviſor, and dieth ſeiſed, the ſame ſhall take away the deſcent.

*Trin.* 28 *Eliz.* In the King's-Bench.

## CCXL. *The Caſe of the Town of* Leiceſter *for Toll.*

2 Inſt. AN Action of Treſpaſs, Tam pro Domina Regina, quam pro ſeipſo; and ſhewed, That the Town of Leiceſter is an ancient Town, and ancient Demeſne, and the Inhabitants there have uſed to be diſcharged of Toll; and that the Queen by her Letters Patents, gave command to all Bailiffs, Sheriffs, Mayors, &c. That thoſe of Leiceſter ſhould be diſcharged of Toll; and notwithſtanding that, That the Defendant took Toll, &c. Exception was taken, becauſe that the ſuit was proſecuted, Tam pro Domina Regina, quam pro ſeipſo: whereas the party grieved was onely to have the information. See the Caſe, 49 E. 36. Where the Writ is, ad reſpondend. tam pro nobis, quam, &c. and no exception is taken to it: Another exception, The Plaintiff declares, That Leiceſter is an ancient Town, and ancient Demeſne, and doth not ſhew that it is parcel of a Manor: See 20 E. 3. Ancient Demeſ. 25. ſuch exception is taken, but after, the Defendant pleads, That all ſuch Towns, whereof the Land in queſtion is parcell, is ancient Demeſne, and ſuch plea was holden good: See 30 E. 3. 12. parcell of a Manor, which is ancient Demeſne; and the Plaintiff replied, Abſque hoc, that it is parcell of the Manor: Another exception, That Lands holden in Socage onely, and no other ought to be diſcharged of Toll; and here it is not ſhewed in the Declaration, that the place where, &c. is holden in Socage, To which it was anſwered, That the ſame needs not to be ſet down in the Declaration; for that is implied in theſe words, Ancient Demeſn. for otherwiſe it cannot be but Socage Land onely, and of no other Tenure: A fourth Exception,

Exception, The Letters Patents here ſhewed in diſcharge, are of no value; for the King by his Letters Patents cannot diſinherit any one, Erg. nor diſcharge one of Toll which is a kind of diſinheritance; To which it was ſaid, That the Plaintiff doth not declare of any Grant, but of an uſage or cuſtome, for thoſe of ancient Demeſn; and farther, hath commanded by the ſaid Letters Patents, that ſuch cuſtoms and uſages ſhould hold place; and upon the cuſtome, and the contempt, this Action is grounded: A fifth exception, becauſe the Plaintiff hath not ſhewed, that the Toll whereof the Plaintiff hath counted, was concerning things for proviſion for their houſes, manurance of their lands, &c. 7 H. 4. 111. In an Action upon the Caſe for not paying of Toll, The Defendant ſaid, That he held certain lands of R. Lord of the Manor of H. which Manor is ancient Demeſn, of which Manor all the Tenants have been free, to ſell or buy beaſts or other things, for the manurance of their lands, and maintenance of their houſes, without paying Toll in any Market or Fair, &c. And ſo juſtifies, that he came to the ſame Market, and bought certain beaſts, as the Plaintiff had declared, and that ſome of them he uſed about his manurance of his lands, and ſome of them he put into paſture to make them fat, and more fit to be ſold, and afterwards, he ſold them at ſuch a Fair, &c. and the opinion of the Court was with the Defendant: And by Godbury and Coke, Such Tenants ſhall be diſcharged of Toll, not onely for buying of things which concern their ſuſtenance, proviſion, and manurance of their lands, but alſo for all things bought, as common merchandizes: 28 Aſſ. ult. by Thorp, Green and Seton, of all things bought by any for his own uſe, they ſhall be quit of Toll; and then, if the priviledge of Tenants in ancient Demeſn, ſhall not be quit of Toll, but for things bought for their ſuſtenance, proviſion and manurance of their lands, they have no more favor than ordinary Subjects: See 19 H. 6. 66. Some are of opinion, That ſuch Tenants ſhall not pay Toll for things ſold and bought, coming upon their lands, and touching their ſuſtenance: See F. N. B. 228. D. ſuch Tenants are diſcharged of Toll for all things by them ſold and bought, by way of merchandize; as alſo of things of neceſſity, as ſuſtenance: And ſee Crook, in the caſes of Itiner. 138. he conceives, that ſuch Tenants for merchandizes ſhall pay Toll as other merchants; but ſee the Writ of F. N. B. 228. the words are De bonis, & rebus ſuis, And Coke ſaid, That he had found the reaſon wherefore ſuch Tenants ſhould be quit of Toll throughout the Realm, in an ancient Reading, viz. That all the lands in the hands of Edw. the Confeſſor and Wil. the Conqueror ſet down in the Book of Doomſday were ancient Demeſn, and ſo called Terræ Regis, and they were to provide victuals for the Kings Garriſons, for then they were troubleſome times; and for thoſe cauſes, and becauſe they made proviſions for others, they had many priviledges, amongſt which this one; Ut quietius aratra ſua exercerent, & terram excolerent: The Lord himſelf, in ancient Demeſn ſhall not have ſuch priviledge, for his Seignory is pleadable at the Common Law: Vid. F. N. B. 228. B. And he ſaid, That the Plaintiff ought to alledge, that his lands are parcel of ſuch a Manor; for there cannot be ancient Demeſn, if there be not a Court and Suitors, &c. And he granted, that ſuch a Town might be ancient Demeſn of the Crown, but yet they ſhall not have the priviledges and liberties which the Tenants in ancient Demeſn have. Towns were before Manors: London hath the name of ancient Demeſn, and yet they have not ſuch liberties, nor the lands in it pleadable by Writ of right Cloſe. 7 H. 6. 31, 32. Shute, Juſtice, was of opinion, That an Inhabitant within ancient Demeſn, although he be not Tenant ſhall have the priviledges: See for that, F. N. B. 228. B. Tenants at will in ancient Demeſn ſhall be diſcharged of Toll, as well as Tenants of the Freehold for life, or for years, 37 H. 6. 27. by Moile. London is ancient Demeſn; for they deſcribe, that a Villein who hath

there

there dwelt, &c. shall not be taken from thence by Capias, or Attachment, Billing. London is not in the Book of Doomsday. Moile, They make their Protestation in a Writ of Right Patent. Littleton, That is used in divers places, and at this day in Exeter. And by Clench, If a Tenant in ancient Demesn levyeth a Fine of his lands, then he shall not have the privilege, untill the Fine be reversed, Quod fuit concessum: If the Lord of a Mano in ancient Demesn, purchaseth all the Tenancies, the whole privilege is gone, which Coke denyed. The Case was adjorned.

*Trin.* 28 *Eliz.* In the Common Pleas.

## CCXLI. Lennard's *Case*.

2 Roll. 787. 3 Len. 128.

IN the Case of Lennard, Custos Brevium, who was Plaintiff in an Action of Trespass for breaking of his Close; The Defendant pleaded, That William Heydon was seised of the lands, and enfeoffed him: And upon Ne enfeoffa pas, the parties were at issue; and it was found by special Verdict, That the said William Heydon was seised, and leased the Lands to the Defendant for years; and afterwards he made a Deed of Feoffment to the same Lessee of the same Lands in Fee, by the words of Dedi & concessi, with a Letter of Attorney within the said Deed, to make Livery to the Lessee; and the Deed of Feoffment was delivered to J. to deliver the same to the said Lessee, who delivered the same accordingly: The Lessee delivered the same to the Attorney named in the Deed, who made Livery accordingly: And it was moved by the Council of the Plaintiff, That upon all this matter, here is not any Feoffment: And by Walmesly, Serjeant, This Deed so delivered took its effect presently as a confirmation; and then the Livery and Seisin comes too late; for as soon as the said Deed was delivered to the Lessee for years, the Law gave to it, its operation to this effect, To vest the Fee and the Freehold in the Lessee by way of confirmation: See for that, Littl. 532, 533. But the whole Court was of a contrary opinion; for it is in the election of the Lessee to take the Conveyance as a Feoffment, or as a confirmation: And here it appeareth upon the Deed, that the intent of both parties was, That the Lessee should take by way of Feoffment, and not of confirmation; for otherwise, to what use should be a Letter of Attorney inserted in the Deed? And here the Lessee hath liberty to make his election how he will take; either by Feoffment, or by confirmation, which election he hath determined by the acceptance of the Livery: And by Anderson, If tenant in tail be disseised, and makes a Charter of Feoffment, and delivers the same to the Disseisor, who delivers the same to the Attorney, named in the Charter, who makes Livery accordingly: here is a good Feoffment, and a discontinuance; and afterwards, after many motions made, and day given to shew cause, Judgment was given, that the Plaintiff should be barred.

*Trin.* 28 *Eliz.* In the Common Pleas.

## CCXLII. Rooke *and* Denny's *Case*.

IN an Action upon the Case, by Rooke against Dennis, for misusing of the Plaintiff's Horse, by occasion of which misuse, the said Horse became blind of one eye, and gall-back'd. The Plaintiff counted, That the said Horse was stolen by three Felons, after whom the Plaintiff made fresh suit, and that the Felons were apprehended, and attainted at

at his suit because Justice Windham: and that the said Horse came unto the hands of the Defendant, who misused it, Ut supra: The Defendant said, that before that, and the said Attainder of the said Felons, the said Felons had waived the said Horse within his Manor; in which Manor he had waife and estray, &c. And it was holden by the Court, that the same was no Plea, without traversing the fresh suit, whereof the Plaintiff hath declared; for by the fresh suit, the property of the Plaintiff in the said Horse was preserved; and so upon that misuser of the Horse by the Defendant, an Action well lyeth: and Judgment was given for the Plaintiff accordingly. Hetley's Rep. 64. Rolls 809. More 572. Hetley's Rep. 64.

*Hill.* 29 *Eliz.* In the King's Bench.

## CCXLIII. Pretiman *and* Cooke's *Case*.

IN Ejectione firmæ, The Case was, That one Hawkins was seised of three Messuages in Bury, and had issue, Robert, a son, and Christian and Joan, daughters; and by his Will, devised his three Messuages to his wife for life, the remainder of one of them to Robert his son and his heirs, and the remainder of another of them to Christian his daughter, and her heirs; and the remainder of the third Messuage, to Joan his daughter, and her heirs: And farther willeth, That if any of his said three issues should die without issue, of his, or her body, that then the other surviving, shall have, Totam illam partem, betwixt them equally to be divided: The Devisor died, the wife died, one of the daughters died, having issue; the son died without issue, the sister surviving, entred into the whole part of Robert, the son, and died; her husband held in the land as tenant by the Curtesie; and the question was, If the surviving daughter should have all the part of him that died without issue, or she and the issue of the other daughter? Coke, The survivor shall have the whole: And he said, that the Devisees have an Estate in tail, for the Fee doth not vest in them, for it is incertain which of them shall survive; but when one surviveth, then he shall not have for life, but in Fee; for the words, Totam illam partem, goe as well to all the Estate, as to all the things. A. tenant for life, the remainder to B. in tail, the remainder to the right heirs of A. A. grants, Totum statum suum, both the Estates pass, and the Grant includes the whole; See 41 E. 3. Fitz. Br. 541. In Ravishment of Ward, supposing the ravishment of two daughters, Quarum maritagium ad ipsum pertinet, and it was challenged, because he doth not say Maritagia, but the challenge was not allowed; and he said, That if a man deviseth his land wholly to A. that he hath a Fee-simple: See the Case, H. 28 Eliz. the Case between Higham and Harwood: And Coke said, That they had by this Devise a Fee-tail, with a Fee-simple Expectant, each of them severally in the Messuage to them limited: Golding, Each of the Devisees hath an Estate-tail in the Messuage, to them devised, and but an Estate for life in the Messuage which is to accrue upon the death without issue, &c. For no Estate is limited expressly, nor what Estate the survivor shall have; for here are not any words which do import a Fee-simple, as (according to Littleton) imperpetuum; or to do what he will with, &c. See for that 22 E. 3. ad Terminum qui præteriit: but here are onely bare words, of which no farther construction can be made, but for life: And as to the words, Totam illam partem, the same doth not extend farther, than if he said, Partem suam: And he said, that nothing vests in him who survives; for there ought to be two to take by the survivor, or otherwise nothing shall accrue to the survivor; for the words of the Devise are æqualiter inter eos dividend. and that which accrues by survivor shall be divided betwixt two, otherwise nothing shall accrue. And if it cannot survive to two, then it Ante 129. 1 Cro. 52. 3 Len. 180.

ſhall deſcend to the iſſue of the ſiſter who is dead, and to the ſurviving daughter, and they ſhall be tenants in common, and not joint-tenants. Clench, Theſe words, Totam illam partem, go onely to the houſe, and not to the Eſtate in it, which Shute granted: If both the daughters had ſurvived Robert, they ſhould have Fee in the houſe of Robert not by the Will, but by deſcent; and this Deviſe ſhall not take effect otherwiſe, and the Deviſe as to that is void, and then the Common Law ſhall hold place, and that is, to deſcend to the iſſue of the one ſiſter, and the ſurviving ſiſter: And here the ſurvivor hath but an Eſtate for life in the houſe of Robert, and then by the death of Robert, the Fee-ſimple accruing to the ſurviving ſiſter, the moyety of her Eſtate for life is extinct. And if one of the daughters had died without iſſue before Robert, the houſe of ſuch daughter had come to Robert and the other ſiſter, as coparceners; for the ſon is to have all the Fee, and a moyety of the ſame executed, and a moyety expectant, and the other ſiſter ſhould have a moyety for life, and ſo the Deviſe not void. And afterwards Judgment was given againſt the husband of the ſurviving daughter.

*Hill.* 29 *Eliz.* In the King's Bench.

## CCXLIV. Hurlſtons' *Caſe.*

4 Len. 160. Hurlſton brought a Writ of Error againſt the Queen, upon a Judgment given for the Queen, in the County Palatine of Cheſter; It was moved by Gawdy, the Queens Serjeant, that the Writ did not lye; for he ought to ſue to the Queen by Petition, which ſee 23 E. 3. 22. A Writ of Error cannot be granted, Abſq; ſpeciali gratia Dom. Regis: See alſo 22 E. 3. 3. And the caſe was, That Judgment was given for the Queen in a Scire facias, to reverſe the Patent of the Conſtableſhip of the Caſtle of Cheſter, and by him in Cheſter, there are many Courts; King's-Bench, Common-Pleas, Exchequer, Chancery: And here a Judgment or Decree in the Chancery cannot be reverſed, but by Parliament; and ſo he conceived of a Judgment given in the Chancery at Cheſter, and it cannot be reperſed in the King's-Bench: Alſo they have a cuſtome in Cheſter, that they may reverſe within certain Months the Judgment before. Clench, There needs no Petition, for both the Patentees claim from the Queen; and whether there be Error or not, the Queen is not prejudiced: Coke, There needs no Petition, for it is now paſt, for the Queens Attorney's hand is to it; 11 Eliz. In one Haunce's caſe, a Writ of Error was brought againſt the Queen, and they were compelled to ſue to the Queen by Petition: Coke, In the Exchequer, If an erronious Judgment be given for the Queen in a Bill of Intruſion, the party ſhall have a Writ of Error againſt the Queen without any Petition. It was the caſe of one Eliz. Mordant, 15 Eliz. ſhe brought a Writ of Error to reverſe a Fine, levyed by her, during her minority, againſt the Queen, and the proceeding in it was ſtayed, becauſe ſhe had not ſued to the Queen by Petition firſt: Wray, Many Outlawries have been reverſed by Error without any Petition, and yet in ſuch caſe the Queen hath an immediate intereſt.

*Mich.* 29 *Eliz.* In the King's Bench.

## CCXLV. Gomerſall *and* Gomerſall's *Caſe.*

IN an Account, The Plaintiff charged the Defendant as Bailiff of his Shop, Curam habens, & adminiſtrationem bonorum: The Defendant anſwered to the goods onely, and ſaid nothing to the Shop: Tan-

field

field moved the ſame matter for Error in arreſt of Judgment: As 14 H. 4. 309, 310. One charged another as Bailiff of his houſe, Et curam habens bonorum in eo exiſten. the traverſe was, That he was not Bailiff of the houſe, Prout: that is good, and goeth to all, but he cannot anſwer to the goods, and ſay nothing to the houſe: See 49 E. 3. 7. Br. Accomp. 21. A man brought an Accompt againſt one as Bailiff of his Manor, Habens curam of twenty Oxen and Cows, and certain quarters of Corn: And by Belknap, If he have the Manor and no goods, yet he ſhall accompt for the Manor, and it ſhall be no Plea, to ſay that the Plaintiff ſold him the goods without traverſing, without that, that he was his Bailiff to accompt render: And as to the Manor, he may ſay, that the Plaintiff leaſed the ſame to himſelf for years, without that, that he was his Bailiff: Another exception was taken by him, That the Plaintiff chargeth him with moneys, Ad merchandizandum; And he traverſeth, that he was not his Receivor denarior. ad computandum prout: and ſo he doth not meet with the Plaintiff, and ſo it is no iſſue. And it is not helped by the Statute of Jeofailes, 32 H. 8. but miſ-joining of iſſue is helped by that Statute, 19 Eliz. W. an Attorney of the Common-Pleas, did charge another Attorney of the ſame Court, with a Covenant to have three years board in marriage with the Defendant's daughter; and he pleaded that he did not promiſe two years board, and ſo iſſue was joined and tried, and the ſame could not be helped by the Statute, becauſe it was no iſſue, and did not meet with the Plaintiff: So if one charge in the Debet & detinet, and he anſwers to the Detinet onely, it is no iſſue; and therefore it is not helped by the Statute. In 29 H. 6. in treſpaſs for entring into his houſe, and taking of his goods, the Defendant pleaded, Non intravit, and the iſſue was tried, and damages given; and becauſe the taking of the goods was not alſo in iſſue, all was void, 4 E. 3. One ſhall not accompt by parcels, becauſe the Action is intire: See 3 E. 3. 8. and Book of Entries, 202. A Precedent, 14 H. 7. That the Verdict was not full, and did not go to the whole, and therefore was void. Hele, Serjeant, contrary: And as to the firſt point he ſaid, That there is a Caſe in 9 E. 3. Accompt. 35. where the Plaintiff chargeth the Defendant in accompt as Bailiff of his houſe, and that he had the adminiſtration of his goods; viz. Forty ſacks of wooll; and upon iſſue joined, the Jury found, that he was not Bailiff of his houſe; but they farther find, that he had received the forty ſacks of wooll, to render accompt of the ſame; and the Plaintiff in that Caſe had Judgment for the ſacks of wooll; although there was no Verdict found for the houſe: See 5 H. 7. 24. Where if a Jury be charged with ſeveral iſſues, and the one of the iſſues is found, and the other not; that the ſame makes no diſcontinuance: or if one of the iſſues be diſcontinued, yet it is no diſcontinuance as to the whole. But admit the ſame be not helped by the Common Law, yet he ſaid it is helped by the Statute of 32 H. 8. of Jeofailes; which is, Non obſtant. diſcontinuance or miſcontinuance. Daniel, to the ſame purpoſe: And he ſaid that the Books before cited of 14 H. 4. and 49 E. 3. are not ruled, nor the Caſes there adjudged; in the one Book the Defendant pleaded, That the Plaintiff gave the goods unto him, and in the other Book, that he ſold the ſaid goods unto him, and demanded Judgment of the Action: And he ſaid, That it is no good anſwer; for they are Pleas onely before the Auditors, and not in an Action upon Accompt: and farther he ſaid, That although the Verdict be found but for part, yet it is good; for no damages are to be recovered in an Accompt: In treſpaſs, it is true, if one iſſue be found, and not the other, and joint damages be given; the Verdict is not good for any part, but if ſeveral damages be given, then it is good, as it is ruled in 21 H. 6. Coke, 26 H. 8. is, That the Plaintiff cannot declare generally of an houſe, Curam habens, & adminiſtrationem

onem bonorum; but he muſt farther ſay: Twenty quarters of Corn, or the like, &c. In the principal Caſe, it is a joint-charge and but one for the ſhop and goods; and he anſwers unto one onely, but he ought to anſwer to all, or elſe it is no anſwer at all. But Coke found out another thing, viz. That there is a thing put in iſſue which is not in the Verdict, nor found, nor touched in the Verdict, and that was the Verdict of all which is found not to be good, and it is not helped by the Statute of 32 H. 8. of Jeofailes. I grant, that diſcontinuances are helped by the Statute of 32 H. 8. but imperfect Verdicts are not
Vid. 205. helped thereby: It was a great Caſe argued in the Exchequer-Chamber, and it was Brache's Caſe: An information was againſt Brache, for entring into a houſe, and an hundred Acres of Lands in Stepney; he pleaded, not guilty, The Jury found him guilty for the hundred acres, but ſaid nothing as to the houſe; upon which a Writ of Error was brought, and Judgment was reverſed: and he ſaid, it was not a diſcontinuance, but no verdict for part. Daniel, That was the default of the Clerks who did not enter it, and it hath been the uſage to amend the defaults done by the Clerks in another Term: All the Juſtices ſaid, That is true, if the Poſtea be brought in and not entred; but here it is entred in the Roll in this form. Daniel, Where I charge one in Accompt with ſo much by the hands of ſuch a one, and ſo much by the hands of ſuch a one, although there be but one Abſque hoc to them all, yet they are as ſeveral iſſues. The Court anſwered, Not ſo, unleſs there be ſeveral iſſues joined to every one of them. But by Gawdy, Juſtice, If there be ſeveral iſſues, and the one be found, and the other not, no Judgment ſhall be given: Clench, Juſtice, In the principal Caſe, It is not a charge of the goods, but in reſpect of the ſhop, therefore that ought to be traverſed: Shute, Juſtice, The Traverſe of the ſhop alone is not good: Egerton the Queen's Solicitor ſaid, That the Books might be reconciled, and that there needed not a Traverſe to the goods, for the Traverſe of the ſhop, Prout, is an anſwer to all: But now he takes iſſue upon the goods onely, which iſſue is not warranted by the Declaration; and he ſaid, That if one charge me as Bailiff of his goods, ad Merchandizandum, I ſhall anſwer for the increaſe, and ſhall be puniſhed for my negligence; But if he charge me as his Receiver, ad computandum, I ſhall not be anſwerable, but for the bare money, or thing which was delivered.

## CCXLVI. *Mich.* 29 *Eliz.* In the Common-Pleas.

Poſtea 215. IN Treſpaſs for taking of goods, the Defendant juſtified, as Bailiff to J. S. The Plaintiff by Replication ſaith, That the Defendant preſt his Cattel of his own wrong, Abſque hoc, that he is Bailiff to
1 Leon. 50. J. S. And by Anderſon, If one hath good cauſe to diſtrain my Cattel, and a ſtranger of his own head, without any warrant or authority takes my goods, not as ſervant or Bailiff to another, and I bring Treſpaſs againſt him, he cannot excuſe himſelf by ſaying, that he did it as Bailiff, &c. for once he was a Treſpaſſor; but if one do diſtrain as Bailiff, although that in truth he be not Bailiff, if afterwards, he in whoſe right he juſtifies, aſſents to it, he ſhall not be puniſhed as a Treſpaſſor; for this aſſent ſhall have relation unto the time of the diſtreſs taken, which Periam conceſſit, and alſo Rhodes. A. diſtrains, and being asked for what cauſe he diſtrains, and he aſſigns a cauſe which is not ſufficient, and afterwards an Action is brought againſt
3 Co. 26. him, he may avow the diſtreſs for another cauſe.

CCXLVII. *Mich.*

CCXLVII. *Mich.* 29 *Eliz.* In the Common-Pleas.

THE Case was, That the Queen gave Lands in tail to hold in Capite, and afterwards granted the Reversion: Windham, In this Case the Tenure is not incident to the Reversion, but is in respect of the person; and therefore the Tenure in Capite doth remain; and the Donee shall hold of the Queen as in grois: And also the Grantee of the Reversion, shall hold of the Queen in Capite; and so two Tenures in Capite for the same Lands: See 30 H. 8. Dyer 45. If the Queen in this cause had reserved a Rent upon the Gift in tail, the same should go with the Reversion.

*Mich.* 29 *Eliz.* In the King's-Bench.

CCXLVIII. Dighton *and* Clark's *Case.*

DIghton brought Debt upon a Bond, the Condition of which was, That whereas the Plaintiff was in quiet possession of such lands, If now neither J. S. nor J. B. nor J. G. did not disturb the Plaintiff in his possession of the said lands by any indirect means, but by due course of Law, That then, &c. that Defendant pleaded, That neither J. S. nor J. D. or J. G. did disturb the Plaintiff by any indirect means, but by due course of Law; upon which there was a demurrer. Godfrey, The Plea in Bar is not good; for there is a Negativa pregnans, (scil.) a Negative which implies an Affirmative: See 21 H. 6. 9. In a Writ of Entry, Sur Disseisin, the Defendant saith, That the Demandant by his Deed, after the Darrein continuance, did confirm and ratifie the possession of the Tenant, &c. The Demandant said, Not his Deed after the Darrein continuance; and the same was holden to be, Negativa pregnans; See more there, and see also 5 H. 7. 7. And see farther, 39 H. 6. 8, 9. Another Exception was taken to the Plea in Bar, because he hath pleaded, That neque J. S. neque J. D. neque J. G. had disturbed the Demandant by any indirect means, but onely by due course of Law; and that issue cannot be tried; not by the Countrey, for they cannot know what is a due course of Law; and by the Court it cannot be tried, for the Defendant hath not certainly shewed by what due course of Law the Demandant hath been disturbed, which see 22 E. 4. 40, 41, &c. The Lord Lisle's Case. In Debt upon a Bond, the Condition was, That if the Defendant before such a day, or any other for him, and in his name, come to B. and there shew unto the Plaintiff, or one of his Council, by him assigned, a sufficient and lawfull discharge of an annual Rent which the Plaintiff claims out of two houses of the Defendant in B. aforesaid, That then the said Bond shall be void; and the Defendant said, That he at the day assigned, contained in the Condition, that A. and B. by assignment of the Defendant came to B. and tendred to shew to N. and W. of the Plaintiff's Council, a sufficient discharge of the said annual Rent, and that they did refuse to see it, upon which there was a demurrer in Law: and Judgment was given for the Plaintiff, and that the Plea was no Plea; for the Defendant ought to have shewed in his Plea, what manner of discharge he would have shewed, as a release, unity of possession, &c. But as the Case is here; If the Plaintiff shall traverse the Plea in Bar, the issue joined upon it cannot be tried, for the Jury cannot know which is a lawfull and sufficient discharge, but the same shall be tried by the Court; for if the Defendant had tendered to the Plaintiff a discharge by unity of possession, the Jury cannot know if it be a sufficient discharge: and as the Plea is here, he hath not shewed what discharge

charge he would have shewed to the said Council; and therefore we cannot judge of the same: If one be bound to plead a sufficient Plea before such a day, in such a Court, in such an Action, it is not sufficient that he hath pleaded a sufficient Plea, but he ought to shew what Plea he hath pleaded, otherwise the Court cannot judge if the Plea be sufficient or not: Vid. 35 H. 6. 19. and 37 H. 8. Br. Cand. 16. where a man will plead that he hath saved the party harmless, he ought to shew how. Shute, Justice, and Clench, Justice, If the Defendant had pleaded, not disturbed by any indirect means, such a Plea had been good enough: Gawdy, Justice, If he had pleaded, not disturbed contra formam Conditionis præd. it had been a good Plea; In a Writ of Entry, Ne entra pas, contra formam Statuti, He did not alien within age, is a Negative pregnant: but the party may say, he did not alien, Modo & forma; all the part to this Plea which comes after the But, is surplusage, and Negation: Gawdy, It is a Plea which is pleaded with all the words of the Condition intirely. Clench, The Case put by Godfrey, 22 E. 4. differs from the Case at Bar: For there he pleaded all in the affirmative, therefore in such a Case he ought to plead specially; but in the Case at Bar all is in the Negative, in which Case such special pleading is not necessary. If I be bounden that I shall not go out of Westminster-hall untill night, but tarry in the Hall till night, In an Action against me upon that Bond, I may plead in iisdem verbis: If I be bound upon Condition, That I will not return to Serjeant's-Inn the direct way, but by St. Giles, I shall plead, in totidem verbis: Godfrey, I agree those Cases, for the matter which comes after the But, is triable by the Countrey, but so it is not in the principal Case: Clench, But is but a word of surplusage, and if that, and all which follows had been left out, it had been well enough. It was adjourned.

*Mich.* 26 *Eliz.* In the Common-Pleas.

## CCXLIX. Courtney *and* Kelloway's *Case.*

COurtney brought an Action upon the Statute of 5 Eliz. concerning Perjury, against Kelloway, and declared, That where Sir Gawen Carew had heretofore brought an Action upon the Case against the now Plaintiff for slanderous words, viz. because that the said now Plaintiff had affirmed, that the said Sir Gawen had had the Pocks, To which Declaration, the now Plaintiff had pleaded, that Kelloway, the now Defendant, reported to the said now Plaintiff, That he himself, i. e. Kelloway, had heretofore healed the said Sir Gawen of the Pocks, Absque hoc, that he spake them simply of his own head; upon which they were at issue, and the said Kelloway was produced as a witness on the part of the said Courtney; and the said Kelloway, upon his oath, deposed at the Trial of the said issue, That he never had reported to the now Plaintiff, That he himself had healed the said Sir Gawen of the Pocks; for which the Jury found for Gawen, and also assessed greater damages in respect that they found, That Courtney spake the said words of his own head, &c. and not of the report of Kelloway. It was the opinion of the whole Court, that the now Plaintiff should have this Action; For notwithstanding that that oath doth not touch much unto the proof or disproof of the issue, yet because that by reason of the oath the Jury have aggravated the damages, the Action doth lie, as in case of Trespass of breaking his Close, and spoiling his grass, the Defendant pleads, Not guilty; and at the trial of the issue a witness is produced on the Plaintiff's part, who deposeth upon his oath, That the Land where, &c. was so rich in grass, that it was ready to be mowed whereas in truth none, or very little grass was there growing,

growing, yet if the Jury finds upon other evidence the Defendant guilty, it is an occasion to induce the Jury to tax the greater damages: all which the Court granted.

*Mich.* 26 *Eliz.* In the Common Pleas.

## CCL. Holland *and* Drake's *Case.*

IN an Ejectione firmæ, brought by Holland against Drake, and five others; Drake pleaded, Not guilty; the other five, Quoad 20 acres, pleaded Not guilty also; and as to the residue, that long time before that, Andrews (Lessor of the Plaintiff) had any thing in the land; That Hen. Lord Cromwel was seised, and sealed the same to them for two years, and afterwards granted the Reversion to Andrews, to whom they attorned; Andrews within the said term, entred upon them, and sealed to the Plaintiff upon whom they re-entred, as was lawfull for them to do, The Plaintiff by Replication, said, That long time before the said Lord Cromwel had any thing, &c. Andrews himself was seised, untill by the said Lord Cromwel diseised, and sealed to the Defendants, Ut supra, and granted the Reversion to the said Andrews with attornment, who entred, and sealed to the Plaintiff, who entred, and was possessed, untill by the said Defendants ejected, Modo & forma, pro ut, &c. And upon this Replication, the said five Defendants did demur in Law. It was argued, That the Plaintiff in his Replication, hath departed from his Declaration; for by his Declaration, he hath supposed himself to be ejected by all the five Defendants; and in the Replication he saith, That he was possessed untill by the said five Defendants, who plead in Bar he was ejected; so he hath departed from his Declaration in the number of the Ejectors; for he ought to have said, untill he by the said five, and also by the said Drake was ejected: as 12 E. 4. 6. in trespass upon Entry upon the Statute of 5 R. 2. against J. and E. J. died pendant the Writ, and E. pleaded in Bar, and the Plaintiff did reply and conclude, and so was he seised untill the said E. Simul cum dicto: J. named in the Writ, entred upon the Plaintiff, &c. But the opinion of the whole Court was clear to the contrary; for here in the case at Bar, Drake, by his several issue, which he hath joyned with the Plaintiff, upon Not guilty, is severed from the other five Defendants; and then when they plead in Bar, The Plaintiff ought to reply to them without meddling with Drake, who upon his several Plea, and issue joyned upon it, is a stranger to them; as if the said five had been the onely Defendants: But if he had not replyed to Drake, as if Drake had made default, or had died after the Writ brought; as in the case before cited of 28 E. 4. there he ought to have replyed, as it is objected: So in an Ejectione firmæ of twenty acres, The Defendant, as to ten acres pleads, Not guilty; upon which they are at issue; and the Plaintiff replies, and says, as to the other ten acres, and so was he possessed, untill by the Defendant of the said ten acres he was ejected; this is good without speaking of the other ten acres, upon which the general issue is joyned. And the Court was ready to have given Judgment for the Plaintiff; but they looked upon the Record, and seeing that one issue in this Action was to be tryed between the Plaintiff and the said Drake: And although the Plaintiff offered to release his damages, and the issue joyned, and to have Judgment against the five Defendants who had demurred; yet the Court was clear of opinion, that no Judgment should be given upon the said Demurrer, untill the said issue was tryed; for the Action is an Ejectione firmæ, in which Case the possession of the land is to be recovered; and it may be, for any thing that appeareth, That Drake, who

Vid. antea 41.

who hath pleaded the general iſſue, hath Title to the land, &c. But if this Action had been an Action of Treſpaſs, there in ſuch caſe, Ut ſupra, upon releaſe of damages, and the iſſue joyned, the Plaintiff ſhould have Judgment preſently.

*Mich.* 26 *Eliz.* In the King's Bench.

## CCLI. French's *Caſe*.

IT was preſented before the Coroner, That John French was, Felo de ſe, and that certain goods of the ſaid John French, were in the poſſeſſion of J. S. and this preſentment was certified into the King's Bench; upon which Proceſs iſſued forth againſt the ſaid J. S. and continued untill he was Outlawed. And now came J. S. and caſt in his Writ of Error, to reverſe the ſaid Outlawry, and aſſigned for Error, becauſe that in the preſentment upon which he was Outlawed, there is not any addition given to the ſaid J. S. And at the firſt, it was doubted; If upon that preſentment Proceſs of Outlawry did lye: and Ive, one of the chief Clerks of the Crown-Office, ſaid to the Court, That ſuch Proceſs in ſuch caſe did lye; and that he could ſhew five hundred preſedents to that purpoſe. Another matter was moved upon the Statute of 1 H. 5. 5. of Additions: If this Outlawry by the Statute aforeſaid, ought to be reverſed by default of Addition; for as much as the ſaid Statute ſpeaks onely of Outlawries upon original Writs in perſonal Actions, Appeals and Indictments; But it was agreed by the whole Court, That as to this purpoſe, the preſentment ſhould be accounted in Law as an Indictment, and afterwards the Outlawry againſt French was reverſed.

## CCLII. *Mich.* 26 *Eliz.* In the King's Bench.

A Leaſe for thirty years was made by Husband and Wife, if they ſo long ſhould live, and if they die, &c. That the land ſhould remain to A. their ſon, during the term aforeſaid. And it was holden by Wray, Juſtice, That if the Husband and Wife do die within the term, that the ſon ſhould have the land, De novo for thirty years: But Gawdy was of opinion, that he ſhall have it for ſo many years, which after their death ſhould be expired.

*Mich.* 26 *Eliz.* In the King's Bench.

## CCLIII. Cooper's *Caſe*.

IN an Ejectione firmæ, The Caſe was, That the Husband and Wife had right to enter into certain lands in the right of the wife; and a Deed of Leaſe for years is written in the name of the Husband and Wife, to one A. for to try the Title; and alſo a Letter of Attorney to B. to enter into the land, and to deliver the ſaid Deed of Leaſe to the ſaid A. in the name of the Husband and Wife, and as well the Letter of Attorney as the ſaid Deed of Leaſe are ſealed by the ſaid Husband and Wife with their ſeals, and entry and delivery is made accordingly; the ſaid A. enters, and upon Ejectment, brings an Ejectione firmæ, and the whole matter aforeſaid was found by ſpecial Verdict; and the Plaintiff had Judgment to recover, for the ſpecial matter found by Verdict, i. e. the Deed of Leaſe, and the Letter of Attorney, do maintain the Declaration well enough; and here is a Leaſe made by Husband and Wife, according to that, the Plaintiff hath declared.

3 Cro. 118. 2 Cro. 617. Yel.

Mich.

## CCLIV. *Mich.* 29 *Eliz.* In the King's-Bench.

IN an Action of Treſpaſs for breaking of the Plaintiff's Cloſe, and killing of eighteen Conies there; the Defendant, as to all the Treſpaſs, but to the killing of the Conies, pleaded, Not guilty: and as to the killing of the ſaid Conies, he ſaid that the place Where, is a Heath, in which he hath common of paſture, and that he found the Conies eating the graſs there, and he killed them, and carried them away, as it was lawfull for him to do: Cowper, Although Conies be, Feræ naturæ, yet when they are in in-grounds, they are reduced to ſuch a property, that if they be killed or carried away, I ſhall have an Action of treſpaſs, Vid. 43 E. 3. 24. And if a Deer be hunted by the Plaintiff in a Foreſt, and afterwards in hunting it be driven out of the Foreſt, and the Forreſter doth follow the chaſe, and the Plaintiff kill the Deer in his own grounds, yet the Forreſter may enter into the land of the Plaintiff, and re-take the Deer; 12 H. 8. 9. And although the Defendant hath common in the ſoil; yet he cannot meddle with the wood there, nor with the land, nor with the graſs, otherwiſe than with the feeding of his cattel, for he hath but a faint intereſt; And if he who hath the Freehold in the land, bringeth an Action of treſpaſs againſt ſuch a commoner for entring into his land, and the Defendant plead, Not guilty, he cannot give in evidence that he hath common there: And it hath been late adjudged, That where commoners preſcribe, That the Lord hath uſed to put in ſuch a paſture but ſo many beaſts, that ſuch a preſcription is a void preſcription: It was argued on the other ſide, That the owner of the ſoil, hath not the true property of the Conies in him, but a kind of property: And ſee F.N.B. 86 and 87. Quare clauſum fregit, & 20 Cuniculos cepit: Againſt a ſtranger he may have an Action, but not againſt the commoner, becauſe he hath wrong in his common by the feeding of the Conies there; for although he hath not an intereſt in the ſoil, yet he hath an intereſt in the profits of it, and a commoner may diſtrain the beaſts of him who hath not right of common for damage-feaſance, as the books are, 4 H. 7. 3. 15 H. 7. 15. and there the commoner hath not any remedy, if he cannot enter and kill the Conies, for he cannot take them damage-feaſance, nor can impound them; for no Replevin lyeth of them: if the owner of the ſoil ploweth the lands, yet the commoner may put in his cattel, claiming his common, and he may well juſtifie the ſame, becauſe the wrong beginneth in the owner of the ſoil. At another day, the Caſe was moved again; and then it was argued by Coke, and he ſaid, The point is; Whether a commoner having common of paſture, may kill the Conies which are upon the ground; and he argued, That he might not. And firſt, he ſaid, It is to be conſidered, what intereſt he who hath the Freehold may have in ſuch things as are, Feræ naturæ; and then what authority a commoner hath in the ground in which he hath common. As to the firſt point, he ſaid, That although ſuch beaſts are, Feræ naturæ, yet they are reduced to ſuch a property when they are in my ground by reaſon of my poſſeſſion which I then have of them, that I may have an Action of treſpaſs againſt him who taketh them away: as in the book in, 42 E. 3. If one hath Deer in his Park, and another taketh them away, he may have an Action of Treſpaſs for the taking of them: See 12 H. 8. If a Keeper or Forreſter follow a Buck which is chaſe out of the Park or Foreſt, although he who hunteth him killeth the Buck in his own ground, yet the Keeper or Forreſter may enter into his ground, and ſeize the Deer, becauſe the property and poſſeſſion of the Deer is yet in them by their purſuit: In 7 H. 6. It is holden, That if a wild beaſt doth go out of the Park, the owner of the ſoil hath loſt his property in it; but upon the ſaid book, it

Owen 114. 1 Cro. 876. 2 Cro. 195. 229. Godb. 123.

Godb. 123.

may be well collected, that whilest it remains in the Parke, That the owner of the Park hath property in it; for 18 E. 4. 14. It is doubted, whether a man can have property in such things, which are, Feræ naturæ: But in 10 H. 7. 6. it is holden, That an action of Accompt lyeth for things which are, Feræ naturæ: and see 14 H. 8. 1. In the Bishop of London's Case, and 22 H. 6. 59. That as long as such things are in the parties ground, they are in his possession, and he hath a property in them; and in an Action brought for them; The Writ shall be, Quare damas suas cepit, by Newton; And see in the Register, fol. 102. where an Action was brought, Quare ducent. Cuniculos suos pretii, &c. cepit. It hath been objected on the other side, That the Defendant hath common there; To that I answer, Admit he hath common, yet he hath not an interest in the soil; for he cannot meddle with the wood, grass, or other profit arising of the soil, but the interest which the commoner hath, is onely the feeding of the grass with the mouths of his cattel: and if he who hath the Freehold in the ground, doth bring an Action against the commoner for entring into his land; If the Defendant pleads, Not guilty, he cannot give evidence that he hath common there; for such evidence will not maintain the issue: See 22 Ass. A commoner cannot take in the cattel of a stranger to agist upon the common; and therewith agreeth the book of 12 H. 8. and so it hath been adjudged in this Court. Godfrey, contrary: And he argued, That it is lawfull for the commoner to kill the Conies feeding in the common: And he agreed all the cases which were put by Coke; and farther he said, That the owner of the ground had not an absolute, but a kind of a qualified property in the Conies; and therefore see the Book of 3 H. 6. and F. N. B. If a Writ of Trespass be brought, Quare Cuniculas suas cepit, the Writ shall abate; and yet he hath a kind of property, or a possession rather in them. I grant that against a stranger the Plaintiff might have his Action for killing of his Conies, but not against the commoner, because the commoner hath a wrong done unto him by the Conies, eating of his common, and therefore he may kill them; and although the commoner may not meddle with the land, because he hath not an interest in it; yet in some cases he may meddle with the profits of it, and he may distrain the cattel of a stranger there, damage-feasance; as the Book is in 15 H. 7. I grant that it is not lawfull for Tenant for life to kill the Conies of him who hath free-warren in the land. For if a man bringeth an Action of Trespass, Quare warrenam suam intravit, & Cuniculos suos cepit: It is no Plea for the Defendant to say, That it is his Freehold. See 43 E. 3. accordingly. In L. 5 E. 4. In Trespass, Quare clausum fregit, & Cuniculos suos cepit: The Defendant said, That the Plaintiff made a Lease at will to J. S. of the land, and that he, as servant to the said J. S. did kill the Conies there, and it was holden a good Plea; and yet it is there said, That by the grant of the land, the Conies do not pass; but the reason of the book might be, as I conceive, because the feeding on the land with the Conies, is to his damage, and therefore, that he might justifie the killing of them: and so are the Books of 2 H. 7. and 4 E. 4. If I have common of pasture in lands, and the Tenant ploweth up the land, I shall have an action upon the Case in the nature of a Quod permittat. And in 9 E. 4. If one hath lands adjoyning to my land, and levyeth a Nulance, I may enter upon the land, and abate the Nulance: So if a man taketh my goods and carrieth them unto his own lands, I may enter therein, and seize my goods: So if a Tenant of the Freehold plows the land and soweth it with corn, the commoner may put in his cattel, and therewith eat the corn growing upon the land: So if a man do falsly imprison me, and put me in his house, I may justifie the breaking open of his house to get forth. In 21 H. 6. All the Inhabitants of a Town do prescribe to have common in such a field every year after Harvest, If one particular man,

man who hath Freehold land, with the ſaid field ſowed, will not within convenient time gather in his Corn, but ſuffer the ſame to continue there of purpoſe to bar the Inhabitants of their Common, The Inhabitants of the Town may put in their Cattel into the ſaid field, and therewith eat his Corn, and he ſhall have no remedy for their ſo doing; and he put the Queſtion, What remedy the Commoner ſhould have for the eating and deſtroying of his Common which his Cattel ſhould have, for that he can neither diſtrain them damage-feaſance, nor impound them: for a Replevin doth not lie of Conies; and therefore he ſaid, he hath no other remedy but to kill and deſtroy the Conies. See 19 E. 3. and F. N. B. If the Lord doth ſurcharge the Common, the Commoner may have an Action againſt him; but in this Caſe he can have no Action: Gawdy, Juſtice, The Commoner cannot deſtroy or kill the Conies, becauſe he may have other remedy: Shute, Juſtice, A Commoner cannot take or diſtrain the beaſts of the Tenant of the land for damage-feaſance, therefore he cannot take or deſtroy the Conies which are upon the land, becauſe he may have other remedy; for he may have an Action upon the Caſe, or an Aſſize for putting of the Conies upon the land, if the owner of the land leave not ſufficient Common for the Cattel of the Commoner; and afterwards Judgment was given for the Plaintiff.

*Hill.* 29 *Eliz.* In the Exchequer-Chamber.

## CCLV. Manwood *and* Burſton's *Caſe*.

MAnwood, chief Baron of the Exchequer, brought an Action upon the Caſe againſt Burſton, and declared, That whereas Agnes Griffin was poſſeſſed of the third part of the Manor and Rectory of Higham for term of years, by Demiſe of the Maſter and Fellows of St. John's College in Cambridge, made to Worthington; and whereas John Sutton was poſſeſſed of another third part of the ſaid Manor and Rectory by the ſame Demiſe; and whereas John Palmer was poſſeſſed of another third part of the ſaid Manor and Rectory for the ſame term, The ſaid Burſton, 20 Aprilis, 28 Eliz. in conſideration that the ſaid Plaintiff, Obtinuiſſet de præd. Agnet. totum terminum ſuum aſſurari ipſis Rogero Manwood, and the Defendant; (ſcil.) Unam medietatem dictæ tertiæ partis dicto Rogero, & alteram medietatem, unto the ſaid Defendant, apud London, in ſuch a Ward, Aſſumpſit eidem querent. Quod ſi idem querens procuraret dictam Johannem Palmer, to aſſent and ſell his third part, the one moyety to the Plaintiff, and the other to the Defendant for 320 l. That the Defendant ſolveret æquam portionem inde, (ſcil.) 160 l. And licet, the Plaintiff, had procured the ſaid Palmer, 22 Aprilis, an. ſupradict. to aſſent and ſell the third part for 320 l. to be paid 3 Maii, the ſame year, and the reſt at another day; and licet, the ſaid Plaintiff was ready to pay his part, and offered the ſame, (ſcil.) 160 l. And licet the ſaid Palmer was ready and offered to ſell and convey his term aforeſaid, &c. yet the ſaid Defendant, ſolvere æquam partem ſuam, (ſcil.) 160 l. Non fuit paratus ſed recuſavit. for which the ſaid Palmer, Noluit vendere his part or intereſt, by which the Plaintiff was damnified, &c. The Defendant pleaded, That after the Aſſumpſit, the Plaintiff did diſcharge the Defendant of the ſaid promiſe; upon which they were at iſſue; and it was found for the Plaintiff, who had Judgment to recover. Upon which Burſton brought a Writ of Error in the Exchequer Chamber. And divers Errors were aſſigned: 1. It is not ſhewed at what time the term of Agnes Griffin did begin: 2. The Leaſe of the College is not ſhewed to be by writing: 3. It is not ſhewed for what term Palmer was poſſeſſed: 4. It is not ſhewed at what time the Plaintiff had obtained the part of Agnes: 5. The Aſ-

ſumpſit is laid to be, apud London, in Warda de Farrington extra, and ſo apud London; and extra London, which is repugnant: 6. The Plaintiff hath declared, That the Colledge had leaſed to Worthington; and that A. and B. were poſſeſſed, Virtute dimiſſionis præd. To theſe Errors, the chief Baron put in his anſwer in writing: As to the two firſt, they are in the recital, and but matter of induction to the conſideration, and not traverſable, nor otherwiſe material to be alledged for the commencement of them, or for the Rent, but onely the ending of the term to come is ſufficient: As in an Action upon the Caſe; That whereas the Defendant was indebted unto the Plaintiff in divers ſums of money, amounting to 40 l. the Defendant, in conſideration thereof, promiſed, &c. the Plaintiff needs not to ſhew any certainty of the Contract, or other circumſtance, how, or in what manner the Debt did accrue, or begin: As in an Action upon the Caſe, The Plaintiff declares, That whereas he hath married the daughter of the Defendant, the Defendant in conſideration that the Plaintiff would aſſure to his ſaid Wife, Land to the yearly value of 20 l. for her jointure, as ſhall be adviſed by the Council of the Defendant, That he will pay unto the Plaintiff 100 l. And licet the Plaintiff hath made ſuch a jointure of Land in S. unto ſuch yearly value for the uſe of his Wife, by the advice of the Council of the Defendant, &c. Here the Plaintiff needs not to ſhew what manner of Conveyance, or Aſſurance was adviſed; for it is ſufficient, if the conſideration recited be proved in evidence with the circumſtances; but in pleading, it is not traverſable nor iſſuable. The third Error is miſtaken: The fourth is anſwered as the two firſt; for it is but matter of recital; and the conſideration paſt and executed before the Aſſumpſit, and not at the time of the Aſſumpſit, and but an Induction or conveyance to the Promiſe: The fifth matter is miſ-conſtrued; for there are two Wards of Farrington, infra, & extra: infra the Walls, and extra the Walls, and yet both, apud London, and extra is to be referred to Farrington, and not to London; and there ought to be made a point after extra; as Farrington extra; London. The ſixth is miſtaken; for there is no Error in that: for the Aſſignee is poſſeſſed, Virtute dimiſſionis; for the original Leaſe is the virtue and ſtrength of the poſſeſſion of the Aſſignee: But if theſe exceptions had been material, yet foraſmuch as the iſſue is not upon the Aſſumpſit, for that is confeſſed by the Defendant, and by that the recital, conſideration, and all the ſpecial matters confeſſed to be true: But the Defendant hath pleaded a new matter after the Aſſumpſit, in diſcharge of the Aſſumpſit, which diſcharge is found againſt him, all the particulars in which the Errors are aſſigned, are out of the Book; and now the matter of diſcharge is onely material: As in debt for arrearages of Rent reſerved on a Leaſe for years, if the time and place of the making of the Leaſe be not ſet forth in the Declaration, the Declaration is not good. But if the Defendant plead a collateral matter; as releaſe of the arrearages, or other ſuch matter, now all the imperfections of the Declaration are waved, &c. At another day the matter was argued again. There are three manner of conſiderations upon which an Aſſumpſit may be grounded: 1 A debt precedent: 2 Where he to whom ſuch a promiſe is made, is damnified by doing any thing, or ſpends his labour at the inſtance of the Promiſer, although no benefit cometh to the Promiſer: As I agree with a Surgeon to cure a poor man (who is a ſtranger unto me) of a ſore, who doth it accordingly, he ſhall have an Action: 3 Or there is a preſent conſideration, &c. The firſt Exception was, becauſe the Aſſumpſit being laid to procure ſuch a Leaſe which another had, i. e. one A. it is not ſhewed in the Declaration, in facto, That A. had ſuch a Leaſe, and if he had not any ſuch Leaſe, then there cannot be any conſideration to procure it: For, Ex nihilo, nihil fit. Secondly, the Declaration

tion is, That A. was poſſeſſed of a Leaſe for years, to be ended and determined in An. 1606. without ſhewing any beginning of it; and although that Leaſe be but matter of Conveyance and inducement, yet, becauſe it is the ground of the Action, it ought to be certainly and ſufficiently ſet forth. Thirdly, the Leaſe to be procured, is laid to be made by a College in Cambridge, and it is not ſhewed for what term of years, i. e. for 21 years or under; for if it be above, then ſuch Leaſe is void. Fourthly, It is not laid in the Declaration, that the Leaſe was by writing, and then void; for a College cannot make a Leaſe without writing; and it ſhall be intended it was made without Deed, becauſe it is not laid to be by Deed: As if a Corporation makes a Leaſe for life, and afterwards granteth the Reverſion for years, he that will entitle himſelf to the ſaid Reverſion, ought to ſay in pleading That he made the Leaſe for life by Deed, although the Leaſe for life in ſuch caſe be but matter of Conveyance: Fifthly, It is not laid in the Declaration, That the Leaſe to be aſſured was in eſſe, and had continuance at the time it was to be aſſured; for although it be laid to be in eſſe, at the time of the promiſe, yet being a particular intereſt, it ſhall not be intended to continue, if it be not ſpecially ſhewed: As 10 H. 7. 26. Sixthly, Here the Plaintiff hath not cauſe of Action, but Palmer, for the Aſſumpſit upon which the Action is grounded, the money is to be payable to Palmer, not to the Plaintiff, 2 E. 4. 5. My Bailiff lets my Land to Farm, rendring Rent, he ſhall not have an Action for the Rent, but I my ſelf, in whoſe right he leaſed: 25 Eliz. It was the Caſe of one Crewe, I promiſed unto J. S. That in conſideration that he will make unto me a Leaſe for years of ſuch Lands, I will aſſign the ſame to his ſervant. If he will not make the Leaſe, not J. S. but his ſervant ſhall have Action upon the promiſe: and although the Defendant hath pleaded collateral matter, by which the promiſe is confeſſed, yet the ſame doth not amend the matter; for if the Declaration be inſufficient, the Court, ex Officio, ought to ſtay Judgment: As 6 H. 7. 10. In treſpaſs, the Defendant pleads, That there was an Accord betwixt them, that in ſatisfaction of the ſaid Treſpaſs, he ſhould pay to the Plaintiff ſuch a ſum, and make two Windows, the which ſum he had paid, before the day, without ſpeaking any thing of the Windows, The Plaintiff pleaded, No ſuch Accord, and it was found for the Plaintiff; and although the Plaintiff doth admit the Plea as good, yet the Court, ex Officio, ſhall ſtay the Judgment: See the Book of Entries 4. A Carpenter brought an Action upon the Caſe, and declared generally upon the Aſſumpſit, Pro diverſis rebus vocat. Carpenters wares, & pro diverſis laboribus per querent. at the inſtance of the Defendant, in arte lignaria, &c. and holden good without any particulars. It was adjourned.

25 Eliz. Crew's Caſe.

*Mich.* 29 *Eliz.* In the Exchequer-Chamber.

## CCLVI. Payne's *Caſe*.

A Writ of Error was brought by Payne, Treaſurer of the Records of the King's-Bench, in the Exchequer-Chamber, upon a Judgment given in the Court of Exchequer, upon an aſſignment of a Leaſe for years, by the Earl of Oxford, to the Queen: One Error is aſſigned, That whereas the iſſue was joined upon intruſion, in taking of the profits, and ſo two matters put in iſſue; The Jury have found Payne guilty of intruſion; but have ſaid nothing of the taking of the profits, and ſo the verdict doth not fully meet with the iſſue: But the great matter of the Caſe was upon this point; The Information is, That the Aſſignment to the Queen was 16 Maii, the Intruſion, 17 Maii, the Inrol-

3 Len. 144.

Inrollment of the Deed of Aſſignment, the 18. of May. So it appeareth upon the Record, That the intruſion is ſuppoſed to be done before the Queen have any intereſt in the Lands, in which the intruſion is ſuppoſed, for nothing was in the Queen before the Inrollment; For the Queen is a Corporation of State, of ſuch prerogative and excellency, that ſhe cannot give or take intereſt in any Lands without matter of Record; and this Leaſe is a Chattel Real, and intereſt in Lands: See as to the Inrollment, 1 H. 7. 30, 31. 5 E. 4. 7. 7 E. 4. 16. But I grant that if the Leſſee for years be outlawed, the Leaſe ſhall be in the King, without Office, for the Outlawry it ſelf is a ſufficient Record to entitle the King to it: If the Queen makes a Leaſe for years of Land, rendring Rent, with clauſe, That if the Rent be behind, that the Leaſe ſhall ceaſe if the Rent be not paid, it was agreed here in Sir Moile Finche's Caſe, That the Leſſee continuing his poſſeſſion, ſhall not be accounted an intruder before Office thereof found; but he ſhall be accountant to the Queen for the profits, as Bailiff of his own wrong. But here we are charged with intruſion: It hath been doubted, if perſonal things be in the King without Office, 37 H. 6. but now it is clear that it is: as 35 E. 3. Br. Prærogat. 113. The Villain of the the King purchaſeth goods, the property thereof is in the King without ſeiſure, and ſo of all perſonal Chattels, becauſe tranſitory, 1 H. 7. 17. 4 H. 7. 1. 39 H. 6. 26. And here it appeareth upon Record, that this Deed of Aſſignment, was delivered to Baron Clark, the 16 of May, at Weſtminſter: and to that we ſay, That the ſaid day was, Dies Aſcentionis, & ſic non juridicus, and ſo no Court there then holden, and then the ſaid Deed was not delivered in Court of Record, and then not delivered unto him as a Judge, but as a private perſon, although it was delivered to the uſe of the Queen: But in 37 H. 6. there is ſome opinion, That if ſuch a Deed be delivered in Court to one of the Barons, or be put into the King's Coffers, that then it is a Record. Atkinſon contrary, And as to the firſt Exception; It is to be known, That in every Plea, where a contempt is laid to the charge of the Defendant; he ought firſt to excuſe or clear the contempt: and therefore here, the Exordium of the Plea is, Quoad venire vi & armis, & quicquid eſt in contemptum dominæ Reginæ, nec non de tota ulteriore tranſgreſſione & contemptu per ipſos fieri ſuppoſit. ipſe in nullo eſt inde culpabilis: and afterwards plead over; and ſo it is in an Action of treſpaſs: and alſo upon the Statute of 8 H. 6. of Forcible entry; and here the iſſue upon the contempt follows the other iſſue: for if the one iſſue be found againſt the Defendant, ſo alſo is the other. As to the other point, I grant, That a Corporation cannot take, or ſpeak without writing: And the King being the Corporation of Corporations, and the chief of Corporations, and who makes all Corporations, cannot take without a writing of as high a nature: (ſcil.) Record. And we have a Record here, (as it is granted of the other ſide) being inrolled the 18. of May, which was delivered the 16. of May; and then Payne, upon the whole matter, was the 17. of May an intruder, by relation of the Deed to the time of the firſt delivery; And an intruder by his entry cannot gain any thing out of the Queen; and therefore the information upon the intruſion is, diverſis diebus, & vicibus intruſit: although it be but one continued poſſeſſion; and therefore at every inſtant, during his poſſeſſion, he is an intruder: As unto the delivery of the Deed of Aſſignment upon the day of the Aſcention, which is not dies juridicus, the ſame is not material, as is 12 E. 4. 8. by Pigot: If the day of the Return of a Writ, i. e. quarto die falls out in die Dominica, yet it is good enough, although no Court can then be holden, but the day following, and the Plea is not diſcontinued; And this delivery of the Deed of Aſſignment, might be out of Term, and therefore at any day within the Term, which is not dies juridicus, but contrary, of a thing which is neceſſarily to be done within the Term: as in the Caſe between

Sir Moile Finches Caſe.

between Fiſh and Broket, of Proclamations made upon a Fine; for a man may acknowledge a Recognizance, or a Deed to be inrolled in the time of Vacation, &c. Tanfield: As to the intereſt, the inrolment hath relation, but not as to the profits; for Payne cannot be an intruder, the 17 of May by any relation. Popham, the Queens Attorney, When an information upon intruſion and taking of the profits is here exhibited, the Defendant ought to juſtifie his entry; and if the entry be found againſt him, ſo as his entry is an intruſion, then the unlawfull taking of the profits is found alſo; and he ſaid, That the Deed acknowledged, and delivered to the Baron, is a Record, although it be not enrolled, be the acknowledgment thereof either out of Court, or in Court: If an information upon a Penal Statute be exhibited unto a Baron of the Exchequer out of Court, and afterwards another informer exhibits another information upon the ſame Statute for the ſame offence againſt the ſame perſon, and that is brought into the Court before the firſt, the firſt information ſhall be preferred, and the Defendant ſhall anſwer to that, and not to the other; and for the exhibiting of it in Court, or out of Court, it is not material: And the Aſſignment, when it is inrolled, hath relation unto the acknowledgment of it: A Reverſion is granted to one for life, the Remainder to the King, the particular Tenant Attorns, the Remainder is not in the King by the Attornment, but if the Deed be afterwards inrolled it ſhall be ſaid to be in the King from the time of the Attornment, and the King ſhall have the benefit of the whole mean profits from the time of the Attornment: A Leaſe for years is made by the King reſerving Rent, with clauſe of diſtreſs; That if the Rent be not paid, that the Leaſe ſhall be void, the Rent is not paid, ten years after an Office is found, the King ſhall be anſwered all the profits from the time of the default of payment of the Rent; and although no intruſion can be laid on the information, 17 Maii, yet it ſhall be for the 18 day of May. Coke, The Judgment for the Queen upon an information of intruſion, Quod defend. de intruſione, tranſgreſſione, & contemptu prædict convincantur, &c. and afterwards a Commiſſion ſhall iſſue forth, to enquire of the mean profits, and there the Defendant may ſhew the matter for to mitigate the damages; and if the intruſion be at any time in the information, it is well enough to have Judgment; and in our Caſe, the continuance is laid 18 Maii. Egerton, Solicitor General, The Record doth warrant the Judgment given upon it; for poſſeſſion laid in the Queen is ſufficient to maintain this information; and here Payne doth not anſwer to the title of the Queen, but traverſeth the intruſion, and therefore being found an intruder by Verdict, Judgment ought to be given upon it, for the Jury have found the intruſion generally, and not ſpecially, the 17 of May, and that cannot be aſſigned for Error; for it is part of the Verdict of which Error doth not lye, but attaint: for if any Error was, the ſame was in the Jury and not in the Court; which Manwood granted: Tanfield, As unto the Caſe of continuance of an intruſion, it is clear, that every continuance ought to have a beginning; for a thing which hath not a beginning, cannot be continued; and here is not any beginning; for the beginning which is laid in the information, is pretended to be, 17 Maii, and that cannot be for the Cauſe aforeſaid: Popham, If an information be brought of intruſion, as appears in many Memorandums in the Exchequer, where, in truth, there is not any Record to move it, and the Jury find the intruſion: Will you have a Writ of Error upon it? And every continuance of intruſion, is intruſion: Anderſon, The ſame matter had been good evidence, Sed non habet locum hic.

Trin.

*Trin.* 29 *Eliz.* In the Common Pleas. *Int. Hil. Rot.* 1544.

## CCLVII. Beale *and* Langley's *Case.*

JOhn Beale was Plaintiff in a Replevin, againſt Robert Langley and Roger Hill: The Caſe was, That Henry, Earl of Arundel was ſeiſed of the Manor of Bury in his Demeſn as of Fee, whereof the place in which, was parcel demiſed and demiſeable, according to the cuſtome of the ſaid Manor by Copy in Fee, whereof Langley was a Copiholder in Fee, &c. and the ſaid Earl ſo ſeiſed, enfeoffed divers perſons of the ſaid Manor unto the uſe of himſelf for life, and afterwards to the uſe of the Lord Lumley, and Elizabeth his wife, daughter of the ſaid Earl, and the heirs of their two bodies begotten, who made a Leaſe of the ſaid Cuſtomary lands by Indenture unto the Plaintiff for 100 years; and the queſtion was, If by this Leaſe, the lands be ſo ſevered from the Manor, that the Copihold is extinct: Walmeſly took exception to the pleading; for that Langley pleads, That the cuſtome within the Manor is, That if any Copiholder ſeiſed of Cuſtomary lands of the ſaid Manor dieth thereof ſeiſed, having many ſons, That the youngeſt ſon ſhall inherit; and he ſheweth, That the Lord of the ſaid Manor granted to his father and his mother the ſaid cuſtomary lands, by Copy, to have to his ſaid father and mother, and the heirs of his father, &c. And that his father died, and that his mother ſurvived him and died, and he as youngeſt ſon, according to the cuſtome entred, and he ſaid, That this cuſtome, ſet forth by the Defendant, doth not maintain his entry; For the cuſtome intendeth but a general and immediate deſcent upon a Copy made unto a man, and to his heirs, but ſuch is not the deſcent here, for the wife ſurviveth; during whole life, the heir cannot enter; nor is there here ſuch Eſtate in the father of the Defendant unto whom the cuſtome ſet forth in the Avowry can extend: For the cuſtome is alledged, Where a Copyholder hath a Copyhold Eſtate to him and his heirs. And here the Title of the Defendant is, That a cuſtomary Eſtate was granted to the father and the mother, and the heirs of the father, ſo as this Eſtate is not within the Letter of the cuſtome; And to that purpoſe he cited the Caſe of Sir John Savage, late adjudged, Where one entitled himſelf to a Copihold in this manner; That within the Manor, there is ſuch a cuſtome, that if one taketh to wife any cuſtomary Tenant of the ſaid Manor in Fee, and hath iſſue by her, he, if he over-live ſuch wife, ſhould be Tenant by the Curteſie, and the Caſe in truth was, That he married a woman, who at the time of the marriage, had not any Copihold, but afterwards, during the coverture, a Copihold deſcended to her. In that Caſe, it was holden, That no Tenancy by the Curteſie did accrue by that cuſtome, which did not extend, but where the wife is a Copiholder at the marriage; and a cuſtome ſhall be in conſtruction taken ſtrictly, and ſhall not be extended beyond the words of it. And as to the matter in Law, he ſaid, That by this Leaſe, the cuſtome was gone, and then by conſequence, the cuſtomary Tenancy, as to that land is determined; for the Eſtate of the Copiholder is, Secundum conſuetudinem Manerii, ad voluntatem Dom. And now by the Leaſe, Langley cannot hold, Secundum conſuetudinem Manerii; for now the ſervices reſerved upon the Copy, and the advantages of Waſte, and other forfeitures, are extinct; ſo that if notwithſtanding the Leaſe, the cuſtomary intereſt ſhould endure, then ſuch a Copiholder ſhould hold this land, diſcharged of all ſervices, &c. in better Eſtate than any Freeholder at the Common Law, and becauſe the ſervices in Law are diſcharge, and cannot be recovered, for that cauſe the cuſtomary intereſt

Sir John Savage's *Caſe.* ante 109.

is

is determined: For the Caſe is, 7 E. 4. 19. by Danby, That the Copiholder ſhall have remedy againſt his Lord, if he put him out, for he payes a Fine when he enters; but here, during this Leaſe, no Fine can be paid upon any deſcent, &c. and the Fine is the cauſe, for which the Copiholder ſhall maintain his poſſeſſion againſt the Lord: But here no deſcent or ſurrender can be preſented; for there is not any Tenant who can do it: See 21 E. 4. 80. by Brian, As long as the Copiholder payeth unto the Lord the cuſtoms and ſervices, If the Lord putteth him out, he ſhall have an Action of Treſpaſs: 42 E. 3. 25. If the Copiholder will not do his ſervices, the Lord ſhall ſeize the lands: And he reſembled this Caſe, to the caſe where the King grants lands, pro bis hominibus de D. the ſame is a good Grant, and that onely in reſpect of the Rent, and for the reaſon of that, it is a good Corporation: But if the King releaſeth the Rent, the Corporation is diſſolved, and the Grant is become void: Fenner, Serjeant, contrary; and he ſaid, That by this Leaſe, being the act of the Lord himſelf, the cuſtomary intereſt is not determined, &c. And the whole Court was of clear opinion with Fenner, That the Copihold did remain, for otherwiſe, by ſuch practices of the Lords, all the Copiholders in England might be defeated; and if any preſudice be grown to the Lord by this act, it is of his own doing, and againſt his own act he ſhall not be relieved: And by Periam, Juſtice, The Lord by his act, i. e. the making of the Leaſe, hath deſtroyed his Seignory, and loſt the ſervices, as to this land: And Windham, Juſtice ſaid, That the Lord himſelf had deſtroyed the cuſtome as to the ſervices, but not as to the cuſtomary intereſt of the Tenant; but the Lord Anderſon was of opinion, That the Rents and ſervices do remain; and if the Copiholder, after ſuch Leaſe committeth Waſte, that it is a forfeiture to the Lord; and that will fall in evidence upon a trial, although ſuch Waſte cannot be found by an ordinary preſentment: and the ſame Law which alloweth the Copiholder his Copihold intereſt againſt this Leaſe, will allow unto the Lord his Rents and ſervices: and he ſaid, That the Lord ſhall have the Rents and ſervices, and not the Leſſee, Quod mirum, againſt his own Leaſe; See 33 Eliz. between Murrel and Smith now reported by the Lord Coke in his 4 Report. fol. 20. Dyer 100. 1 Cro. 35.

*Trin.* 29 *Eliz.* In the Common Pleas.

## CCLVIII. Ruſſel *and* Broker's *Caſe.*

RUſſel brought Treſpaſs againſt Broker, for cutting down of four Oakes. The Defendant pleaded, That the place where, &c. and that he is ſeiſed of a Meſſuage in D. And that he, and all thoſe whoſe Eſtate he hath, &c. Habere conſuerunt rationabile eſtoverium ſuum, for fuel, ad libitum ſuum capiendum in boſcis, ſubboſcis, & arboribus, ibidem creſcentibus: and that, in quolibet tempore anni, but in fawning time; The Plaintiff by Replication, ſaid, That the place where, is within the Forreſt of, &c. and that the Defendant, and all thoſe whoſe Eſtate, &c. Habere conſueverunt rationabile eſtoverium ſuum de boſcis, &c. per liberationem Forreſtarii, vel ejus Deputati, prout boſcus pati poteſt, & non ad exigentiam petentis: And upon that Replication, the Defendant did demur in Law: and the opinion of the whole Court was, That Judgment ſhould be given againſt the Plaintiff; for if he ſhould ouſt the Defendant of his preſcription by the Law of the Forreſt, he ought to have pleaded the Law of the Forreſt in ſuch caſe; viz. Lex Forreſtæ eſt, &c. for the Law of the Forreſt is not the common Law of the Land, and we are not bound to take notice of it, but it ought to be pleaded, or otherwiſe the Plaintiff ought to have traverſed the preſcription of 3 Len. 218.

the Defendant, for here are two prescriptions; one pleaded by the Defendant by way of Bar, the other set forth by the Plaintiff in his Replication without any traverse of that with is alledged in the Bar, which cannot be good; but if the Plaintiff had shewed in his Replication, Lex Forrestæ talis est, &c. then the prescription of the Defendant had been answered without any more; for none can prescribe against a Statute. Exception was taken to the Bar, because the Defendant had justified the cutting down of Oaks, without alledging, that there was not any underwood, but the Exception was not allowed; for he hath choice, ad libitum suum. Another Exception was taken, because he hath not shewed, that at the time of the cutting, it was not fawning time; for at the fawning time his prescription did not extend to it and that was holden a good material exception; but because the Plaintiff had replied; and upon this Replication, the Defendant demurred; the Court would not resort to the Bar, but gave Judgment upon the Replication against the Plaintiff.

Poph. 158. 2 Cro. 637, 679.

## CCLIX. *Mich.* 29 *Eliz.* In the Common-Pleas.

A Black-Smith of South-Mims, in the County of Middlesex, took a Bond of another Black-Smith of the same Town, that he should not exercise his Trade or Art of a Black-Smith within the same Town, nor within a certain precinct of it; and upon that Obligation, the Obligee brought an Action of Debt in the Common-Pleas, depending which, the Obligor complained to the Justices of Peace of the said County upon the matter against the Obligee, upon which the matter being found by examination, the Justices committed the Obligee to prison; and now, upon the whole matter, Puckering, Serjeant, prayed a Habeas Corpus for the said Obligee to the Sheriff of Middlesex, and it was granted: and Fleetwood, Recorder of London, being at the Bar, the Court told him openly of this matter, That by the Laws, Justices of Peace have not Conusance of such offences, nor could meddle with them; for their power is limited by their commission and the Statutes; and the Recorder did much relye upon the opinion of Hull, 2 H. 5. 5. But by the clear opinion of the whole Court, although this Court, being a high Court, might punish such offences appearing before them on Record, yet it did not follow. That the Justices of Peace might so do: But as to the Bond, the Court was clear of opinion, that it was void because it was against Law.

Owen 143. 2 Cro. 596.

## CCLX. *Trin.* 29 *Eliz.* In the Common Pleas.

Ante 34.

A Justicies issued forth to the Sheriff of H. for the Debt of 40l. and the Plea was determined before the Under-Sheriff in the absence of the Sheriff, and it was now moved by Puckering, Serjeant, If a Writ of Error, or a Writ of false Judgment did lie in that Case: And first, the opinion of the Justices was, That the Sheriff himself in his person ought to hold Plea of a Justicies; and if he maketh a Precept or Deputation to another, the same is meerly void: 34 H. 6. 48. And see the said Case abridged; Fitz. Bar. 161. and it was said, That a Justicies is not an Original Writ, but a Commission to the Sheriff, to hold Plea, ultra 40s. and upon a Judgment given upon a Justicies, a Writ of false Judgment lieth, and not a Writ of Error: See for that, 7 E. 4. 23. And it was the opinion of Anderson, chief Justice, That such Judgment is utterly void, and Coram non Judice.

Trin.

CCLXI. *Trin.* 29 *Eliz.* In the Common-Pleas.

NOTE, by Anderſon, chief Juſtice, That if Ceſtuy que uſe, after the Statute of 1 R. 3. leaſeth for years, and afterwards the Feoffees releaſe unto the Leſſee and his heirs, having notice of the Uſe, that this releaſe is unto the firſt Uſe: But where the Feffees are diſſeiſed, and they releaſe unto the Diſſeiſor, although they have notice of the Uſe, the ſame is to the uſe of the Diſſeiſor, and that was the Caſe of the Lord Compton; and that no Subpœna lieth againſt ſuch a Diſſeiſor: See 11 E. 4. 8. 3 Len. 196. 4 Inſt. 85. Kel. 41.

*Hill.* 31 *Eliz.* In the King's-Bench.

CCLXII. Hamper's *Caſe.*

HAmper was indicted upon the Statute of 5 Eliz. of Perjury, and in the body of the Indictment, The Record was, That he, Falſa deceptive depoſuit; whereas the Statute is, Wilfully; and although in the percloſe of the Indictment, the concluſion is, Et ſic commiſit voluntarium perjurium: Yet the opinion of the Court was, that the ſame doth not help the matter; and for that cauſe, the party was diſcharged: For, contra formam Statuti, will not help the matter, nor ſupply it; and yet it was moved and urged, That contra formam Statuti would help it; and it was holden in this Caſe, That if a witneſs doth depoſe falſly, but the Jury doth not give credit to it, nor give their Verdict againſt his oath, although the party grieved cannot ſue him: yet he may be puniſhed at the King's ſuit. 1 Cr. 147. 3 Len. 230.

*Hill.* 31 *Eliz.* In the King's-Bench.

CCLXIII. Moulton's *Caſe.*

IT was moved by Coke, That one Robert Moulton, Tenant in tail, having iſſue two ſons, Robert and John, died ſeiſed, and that Robert his ſon and heir, levied a Fine thereof, and afterwards levied another Fine, and died without iſſue; and John brought two ſeveral Writs of Error to reverſe both the Fines; and the Tenant, to the Writ of Error, brought upon the firſt Fine, pleaded the ſecond Fine in Bar of it; and in Bar upon a Writ of Error brought upon the ſecond Fine, he pleaded the firſt Fine; and the Court adviſed him to plead, That the Fine pleaded in Bar was erroneous: 7 H. 4. 107. where a man is to annul an Outlawry, his perſon ſhall not be diſabled by any other Outlawry. 1 Cro. 151.

*Trin.* 30 *Eliz.* In the Common-Pleas.

CCLXIV. Broccus's *Caſe.*

BRoccus, Lord of a Manor, covenanted with his Copiholder, to aſſure to him and his heirs, the Freehold and Inheritance of the Copihold, and the Copiholder in conſideration of the ſame performed, did covenant to pay ſuch a ſum. And it was the opinion of the whole Court, That the Copiholder is not tied to pay the money before the Aſſurance made, and the Covenant performed: But if the words had 1 Roll. 415. Pordage verſus Cole, 20 Car. 2. B. R.

been in conſideration of the ſaid Covenant to be performed, then he had been bound to pay the money preſently, and he ſhould have his remedy by Covenant.

*Trin.* 30 *Eliz.* In the King's-Bench.

## CCLXV. Foſter's *Caſe.*

NOTE, It was ſaid, and holden by the whole Court in this Caſe, That in Debt brought againſt Executors, If the Defendants plead, That the Teſtator was bound in a Recognizance, in ſuch a ſum, beyond which they have not any thing in their hands; That it is a good Replication to ſay, That the Recognizance was entred into for performance of Covenants contained in certain Indentures, of which Covenants none are yet broken.

*Trin.* 30 *Eliz.* In the King's-Bench.

## CCLXVI. Partridge's *Caſe.*

A Quo Warranto was brought againſt Partridge, in which Caſe, It was holden by all the Juſtices, That a man may preſcribe to hold a Leet oftener than twice in one year, and at other days than are ſet in the Statute of Magna Charta, cap. 35. becauſe the ſaid Statute is in the Affirmative; But Popham ſaid, That one cannot preſcribe againſt a Statute, See for the ſame, Book of Entries, 13 E. 3. Leet 12. and he ſaid, That the want of a Tunbrel and Pillory, is a good cauſe of forfeiture of the Liberty: which Coke denied. And it was farther moved by Popham, That if a general pardon be granted with general exceptions in it, he that will take advantage of the ſame, ought to plead it, and ſhew that he is not any perſon excepted; for otherwiſe the Judges cannot allow him the benefit of it, becauſe they do not know if he be a perſon excepted or not; But if there were ſpecial perſons excepted by name, and none other excepted, but onely thoſe perſons, there the party needs not to plead it, for the Court may diſcern J. B. from J. D. See 8 E. 3. 7. and 26 H. 8. 7. If a man commits Felony, and alſo Treaſon, and afterwards comes a general pardon for the Felony, but Treaſon is excepted, and the party is arraigned of Felony: by Coke, he ſhall have the benefit of the pardon; but Popham contrary, for he is diſabled by the Treaſon. And it was agreed by the whole Court, That in a Quo Warranto, It is not ſufficient for the Defendant to ſay, That ſuch a Subject hath lawfull intereſt to hold a Leet, without making Title to himſelf; for the Writ is, Quo Warranto he claims, &c. And afterwards Judgment was given for the Queen.

*Trin.* 30 *Eliz.* In the King's-Bench.

## CCLXVII. Wiggen *and* Arſcot's *Caſe.*

IN a Prohibition, the ſurmiſe was, That the Expoſition of Statutes doth belong unto the Queen's temporal Courts; and Arſcot had ſued in the ſpiritual Court for Tithes, whereas in truth, for not reading of the Articles according to the Statute of 13 Eliz. he was deprived, ipſo facto, and ſo he was not Parſon: for which cauſe, Gawdy prayed a Prohibition; for he ſaid, that the ſurmiſe was good and ſufficient:

cient: For the Queſtion is, Parſon, or not Parſon? and that ſhall be tried here by the Common Law. And I do not know that it hath ever been ruled here to the contrary before. Clench, Juſtice, It hath not been ruled to the contrary; yet becauſe great inconvenience may ariſe upon the admitting of it, The Court hath taken order, That no Prohibition ſhall be granted upon ſuch a ſurmiſe, without great probability of the truth of the ſurmiſe: Where a Prohibition is awarded upon ſuch a ſurmiſe, the party needs not to prove his ſurmiſe according to the Statute of 2 E. 6. cap. 13. for this ſurmiſe is conceived upon a cauſe of later time, ſince the ſaid Statute, and was not any cauſe to have a Prohibition at the time of the ſaid Statute.

*Trin.* 31 *Eliz.* In the King's-Bench. *Rot.* 759.

## CCLXVIII. Winter *and* Loveday's *Caſe.*

IN an Action of Covenant by Winter againſt Loveday; It was found by ſpecial Verdict, That Winter, by Deed indented Mortgaged to Loveday, a certain Leaſe upon condition to pay 400l. to Loveday at a day certain, at the porch of ſuch a Church; and upon ſuch payment, Winter to have back his Leaſe; and Loveday covenanted, That upon repayment of the money he ſhould have back all his Evidences concerning the ſame: and it was farther found, That at the day of payment one Cornwallys ſent unto Loveday to know if Loveday would receive the money which Winter owed to him, at his houſe, who anſwered that he was content, and he came there, and the money was told and delivered in bags to Loveday; but afterwards ſome contention did ariſe between Winter and Loveday for certain Writings; for which cauſe Cornwallys ſaid, That if they would not agree betwixt them, That they ſhould not have his money. Whereupon Winter requeſted Cornwallis, that he might have the money to carry to the ſaid porch of the ſaid Pariſh Church, who was contented, and there Loveday came to receive it, and Winter would not pay it. Tanfield moved, That the ſame was a good payment to diſcharge the Mortgage; for the money was told in the houſe of Cornwallis, and Loveday there put it up into bags; and the ſame is a good payment and receit: Coke contrary, Here is not any payment, for it was not the money of Winter, but of Cornwallis, as appeareth by the words of Cornwallis; (ſcil.) If they could not agree they ſhould not have his money: Alſo Winter requeſted Cornwallis, that he might have the money to carry to the porch of the Pariſh Church aforeſaid, by which it appeareth, that it was not Winter's money. And for that cauſe, it was alſo the opinion of the Court, that the ſame was not any ſufficient tender. See for this, the Caſe of Watkins and Aſtwick, Hil. 28 Eliz. 1 Len. 34, 35.

*Trin.* 30 *Eliz.* In the King's-Bench.

## CCLXIX. Ordway *and* Parrot's *Caſe.*

ORdway brought a Scire facias againſt Parrot and Hallſey, who were Bail in a Bill of Debt, for one Bennet; and they pleaded, That the ſaid Bennet had payed the money recovered, to the Plaintiff, according to the condition of the Recognizance; and it was the opinion of the whole Court, that it was no Plea without alledging payment upon Record; for if this ſhould be ſuffered, every man ſhould be inforced twice to trie his Action; wherefore the Plea was diſallowed.

*Trin.*

*Trin.* 30 *Eliz.* In the King's-Bench.

## CCLXX. Coniers *and* Holland's *Case.*

3 Cro. 279. 2 Cro. 483. & 620.

IN an Action upon the Case upon Assumpsit, by Coniers against Holland, The Defendant pleaded, That after the promise, that the Plaintiff had discharged him of it: And by Wray, chief Justice, It is a good Plea, and so it hath been often ruled, and it was late the Case of the Lord chief Baron, against whom in such an Action, such a Plea was pleaded, and he moved us to declare our opinions in Serjeant's-Inn: and there, by the greater opinion, it was holden to be a good Plea; for which cause, The Court said to Buckley, who moved the Case, That the Plea is good, and Judgment was entred accordingly.

*Mich.* 33 *Eliz.* In the Common-Pleas.

## CCLXXI. Richmond *and* Butcher's *Case.*

1 Cro. 217.

IN a Replevin, the Case was this; A man made a Lease for years, reserving Rent to the Lessor, his Executors and Assigns, where the Lessor had a Fee-simple in the Lands; it was holden by the Court, That the Rent should go to the heir, notwithstanding the special Reservation, because the words of the Reservation are, During the term, and the other words, To his Executors and Assigns, shall be void, and then the Rent shall go with the Reversion to the heir, which see, 27 H. 8. 19. by Awdley: And it was said by some, That a Rent reserved during the term shall go to the heir with the Reversion: and 12 E. 4. was cited, where a Rent reserved to the Lessor and his Assigns, should not go to the heir; and that these words, During the term, did not mend the matter; for the Lessor might well overlive the term. But in the principal Case, it was said by Periam, Justice, That the Executors should not have the Rent, for they have not the Reversion; but if the Lessor grants over the reversion, the Grantee shall have the Rent. And afterwards Judgment was given against the Plaintiff; for it was in a Replevin, and Judgment was given for the Avowant, who was heir to the Lessor.

## CCLXXII. *Mich.* 30 *Eliz.* In the Common-Pleas.

IN an Action of Trespass brought by a poor woman for breaking of her Close; she declared of a Continuando of the Trespass, by six years and upon Nihil dicit pleaded, she had Judgment to recover; upon which issued forth a Writ of Enquiry of Damages; and now came the poor woman, and shewed to the Court, That the Jury had found too little damages, i. e. but 10s. whereas the Land is worth 4 l. per ann. and the Trespass had continued by six years together, and prayed that the said Writ might not be received, and that the Court would grant her another Writ to have a Melius inquirendum of the damages, but the whole Court denied to grant any such Writ, for so there might be infinite enquiries: But sometimes, at the prayer of the Defendant, when excessive damages are found, or any misdemeanors alledged in the Plaintiff, procuring or using such a Writ of Enquiry of damages, we use to relieve the Defendant, by granting and issuing forth of a new Writ, but to the Plaintiff never, because the suing forth of the Writ is his own act: And by Rhodes, Justice, The late Countess of Darby brought

brought a Writ of Dower, and had Judgment to recover; and ſhe ſurmiſed that her husband died ſeiſed, and prayed a Writ of Enquiry of damages, and had it granted unto her; and becauſe too ſmall damages were found, ſhe would have ſuppreſſed the ſaid Writ, and procured a new Writ, but ſhe could not obtain it; and at laſt ſhe was driven to bring in the firſt Writ, and ſo it was done.

*Hill.* 30 *Eliz.* In the King's Bench.

## CCLXXIII. Scrog's *and* Griffin's *Caſe.*

IN an Action upon the Caſe, upon a promiſe by Scrogs, againſt Griffin; The Plaintiff declared, That whereas ſuch a day, one Brown and another, did run for a wager, from Saint-John-Street, to High-gate, That he of the ſaid two, that firſt got thither, and came again, ſhould have 5l. which wager, the ſaid Brown did win; and whereas after the ſaid match ſo performed, the ſaid Plaintiff affirmed, that there was deceit and covin in the performance of the ſaid match, upon which the Defendant, in conſideration of twelve pence, to him delivered by the Plaintiff, promiſed, that if the Plaintiff can prove, that any deceit or covin was uſed, or practiſed in the performance of the ſaid match, that then upon requeſt, he ſhould pay to the Plaintiff 5l. And upon Non Aſſumpſit pleaded, it was found for the Plaintiff, and it was moved by Foſter, in arreſt of Judgment, That here is not any requeſt ſet forth in the Declaration: and alſo, that this deceit is enquired of in London, whereas it ought to be in Middleſex where the Race was run: and it was agreed by all the Juſtices, That the proof ought to be made in this Action, as in the common Caſes of voyages: and that requeſt now is but matter of conformity, and not of neceſſity. Wray, Juſtice, It is clear, That always proof ought to be as it is here; if not, that the matter be referred to a ſpecial proof, before a perſon certain. And as to the trial, The deceit is not in iſſue, but onely the promiſe; and therefore the iſſue is well tried in London: Alſo this Action here includes proof and requeſt: for there cannot be made any other proof, and the proof is the effect; for which cauſe he concluded, that Judgment ſhould be entred for the Plaintiff, which was done accordingly.

*Paſch.* 29 *Eliz.* In the Common Pleas.

## CCLXXIV. Fuller *and* Trimwell's *Caſe.*

IN a Replevin by Fuller, againſt Trimwell, who made Conuſance, as Bailiff to one houſe for damage feſance, The Plaintiff in Bar of the Conuſance ſhewed, That one A. T. did pretend right to the land where, &c. and the Defendant, in the right of the ſaid A. T. took the cattel, &c. Abſque hoc, that he took them as Bailiff to the ſaid Houſe, upon which the Defendant did demur in Law; and it was argued by Shuttleworth, Serjeant, That the traverſe is not good, which ſee, 26 H. 8. 8. 5 H. 7. 2. Not his Bailiff; but if the truth of the Caſe be ſo, he may plead of his own wrong, without ſuch cauſe, &c. And ſee alſo, 28 H. 6. 4. The Commandment is not traverſeable, but in ſpecial Caſes, where the Commandment determines the intereſt of the other party, which ſee, 13 H. 7. 12, 13. in the Caſe of the Earl of Suffolk in Treſpaſs, the Defendant pleaded. That before the treſpaſs, the Plaintiff was ſeiſed, and thereof enfeoffed one B. by whoſe commandment he entred, to which the Plaintiff ſaid, That after the Feoffment, and before the treſpaſs, the ſaid B. leaſed to the Plaintiff, 1 Roll 46. Antea 196.

tiff, to hold at will, Abſque hoc, that the ſaid B. did command him; and that was holden a good traverſe; for the commandment determines that Leaſe at will; and in the principal Caſe, all the Juſtices were of clear opinion, That the traverſe is good; and they all ſaid, That the Cuſtos Brevium had ſhewed to them many preſidents thereof, See 15 H. 7. 17. and ſee alſo, 7 H. 4. 101, 102. In treſpaſs for taking of cattel, the Defendant did juſtifie as ſervant to ſuch a one for Rent arrere, due to his Maſter; The Plaintiff, Replicando ſaid, That the Defendant was not Bailiff at the time of the taking, where it is ſaid by Gaſcoigne, That if the Defendant takes the cattel, claiming property, as a Heriot due to himſelf, although that afterwards the Lord agrees to the diſtreſs, as taken for Rent arrere; yet he cannot be ſaid his Bailiff at the time of the diſtreſs, which was granted by Rhodes, Periam and Windham: and as to that which hath been objected, That if this traverſe be allowed, the meaning of the party ſhall be drawn in queſtion; i. e. the meaning of him who took the cattel, the ſame is not any miſchief, for ſo it is in other caſes; as in the caſe of Recaption, See 9 H. 6. 1. 45 E. 3, 4.

*Paſch.* 16 *Eliz.* In the King's Bench.

## CCLXXV. Humphreſton's *Caſe.*

More 103. 1 Anderſ. 40. Dyer 337. Owen 64. Sty. 293.

IN an Ejectione firmæ, It was found by ſpecial Verdict, That W. Humphreſton ſeiſed of the Manor of Humphreſton, ſuffered a common Recovery to be had thereof by Kinnerſley and Fowk in the Writ of Entry in the Poſt, to the intent that they ſhould make an Eſtate to the ſaid W. Humphreſton, and Elionar his wife for their lives, the remainder, Seniori puero dicti W. and to the heirs of the body dicti ſenioris pueri legitime procreat. the remainder to the heirs of the body of the ſaid W. Humphreſton, with divers remainders over. And afterwards the Recoverers, in December following, by Indenture made an Eſtate accordingly, and made Livery to W. Humphreſton and his wife; and afterwards, in November, 2 E. 6. by Indenture between the ſaid W. Humphreſton of the one party, and Kinnerſley on the other part, The ſaid W. Humphreſton did covenant with the ſaid Kinnerſley, to do all ſuch lawfull and reaſonable things for to aſſure the ſaid lands unto the uſe of the ſaid W. Humphreſton and Elionar his wife for their lives, and afterwards, to the uſe of the eldeſt child of the body of the ſaid W. Humphreſton lawfully begotten, and to the heirs of the body of the ſaid eldeſt child of the body of the ſaid W. Humphreſton; and after to divers other uſes over; and afterwards, Ter. Paſch. 2 E. 6. W. Humphreſton and Elionar his wife, levyed a Fine of the ſaid land to C. and B. in Fee, to the uſe of the ſaid Indenture; Elionar died, W. Humphreſton married another wife, and had iſſue a daughter, named Frances, and afterwards had iſſue a ſon, named William, and died. William the ſon, being of the age of ſix years, entred into the lands, and leaſed the ſame to the Plaintiff for years, who being ejected by the Defendant, brought the Ejectione firmæ: And this ſpecial Verdict. And the points moved upon it were argued by Atkins, Phetiplace, Fenner, Fleetwood, Plowden and Bromley, and afterwards this Caſe was argued by the Juſtices: And Gawdy, puiſne Juſtice conceived, That Judgment ought to be given for the Plaintiff: Firſt, he conceived, that this Leaſe for years made by the Infant, without Deed and without Rent reſerved is not void; ſo as every ſtranger ſhall take advantage of it, but onely voidable; for an Infant may make a Bond, and a Contract for his commodity and profit, and the ſame ſhall bind him; as for his meat and drink, apparel, &c. But

if

if upon ſuch Leaſe he had reſerved a ſmall Rent, as one peny, where the land was worth 100l. per ann. ſuch a Leaſe had been void; and in our Caſe, this Leaſe was made upon the land, and was made for to try the title to it, which is a good conſideration, and to the profit of the Infant, and for his advancement, and then the Leaſe is not void. It hath been objected, That here the Recovery being ſuffered to the intent that the Recoverers ſhould make an Eſtate, ut ſupra, &c. that the uſe ſhall riſe preſently upon the Recovery to him who ſuffered the Recovery, and then the Recoverers could not make Livery unto him; he held ſtrongly, That the uſe and the poſſeſſion ſhould be adjudged in the Recoverers, untill they made the Eſtates, &c. for they otherwiſe could not make the Eſtates, &c. and theſe words [To the intent] ſhall be conſtrued, that they ſhall have the lands, untill they made the Eſtates, &c. And he held, that the remainder limited, Seniori puero, where there is not any, in rerum natura, is good enough: as a remainder limited to him who ſhall firſt come to Pauls. And he conceived, that the ſon ſhould take this remainder, and not the daughter: and he conceived, that the Eſtate tail here, was not executed, i. e. the ſecond intail; Divers Authors of Grammer, have been produced to prove, that Puer, may be taken both ways, Tam pedry, quam puella, Deſporterius, Calapine, Melanchon, and the Grammer allowed, but I conceive, that Puer is a word proper for a Boy, and Puella for a Maid; and where we have proper words, we ought not to judge but according to them; and becauſe the word is doubtfull, we ought to conſider the cauſe upon the circumſtances, and therefore it is to be intended, that W. Humphreſton had a greater deſire that his ſon ſhould have his Inheritance, than his daughter, if there be not ſome ſpecial matter to prove that the intent of the father was for his daughter. Southcote, Juſtice, agreed with Gawdy in the firſt point; and alſo that the Recoverers have convenient time to make the Eſtates; and that they are to make the ſame without requeſt for the benefit of the wife, who is a ſtranger to it, and is to have the lands for her joynture; and he cited the Caſe of the Abbat of York, 44 E. 3. 8. and 9. where the difference is taken between a Feoffment made upon condition to re-enfeoff the Feoffor, or to enfeoff a ſtranger: And here in our Caſe the Feoffment is made in convenient time, and here is ſufficient conſideration, That the Recoverers ſhall be ſeiſed to their own uſes, untill, &c. And theſe words, [Ea intentione] ſhall be taken for a Condition: And alſo that this remainder limited, Seniori puero, is good notwithſtanding that there be not any Senior puer alive at the time. And as to the word (puer) he held, that it did extend to both Sexes indifferently; and becauſe it is doubtfull what Sex the father intended, we are to conſtrue the ſame upon the circumſtances, which appear upon the parts of the Indentures: and here it appeareth upon the Indenture, that he hath explained his mind, (ſcil.) Eldeſt child, be it Male or Female: As if I have two ſons, named J. and I deviſe my lands, or limit a remainder to J. my ſon, the Law ſhall conſtrue this Deviſe to extend to my younger ſon; for without deviſe or limitation my eldeſt ſon ſhould have it. But if J. S. hath two ſons, known by the names of A. and I Deviſe lands to A. ſon of J. S. there I ought to explain my meaning openly: And he conceived, That the Eſtate tail is executed defeaſiable in W. Humphreſton, upon iſſue afterwards had; and that the daughter ſhould have the lands, and not the ſon; and if the Fine deſtroy the remainder in abeyance limited to the eldeſt child, then the ſaid eldeſt child ſhall have it, de novo, by the later conveyance. And as to the Warranty of the Fine, becauſe the poſſeſſion of the Conuſees is removed by the Statute of 27 H. 8. to the daughter, ſhe ſhall not have the benefit of the Warranty as to vouch, but ſhe ſhall Rebutt: as 22 Aſſ. 37. 69. Where a Feoffment in Fee is made to my Villein with Warranty

2 Roll 789.

Roll ſupra Roll 407.

and before that the Feoffor dieth, I enter upon my Villein, so as the Warranty upon the death of the Warrantor is not attached upon the possession of my Villein, I shall not have advantage of that Warranty: A Disseisor makes a Feoffment in Fee upon Condition, the Disseisee releaseth the Feoffee with Warranty, the Disseisor entreth for the condition broken; now the Disseisor shall Rebutt by that Warranty, but not vouch. And here in our Case, the Fine is a discontinuance, so as the son is put to his Action, if he had right, and then the Warranty shall bind him; but contrary, if his entry be lawfull. And as to the Lease made by the Infant, he conceived, that it being made without Rent, it was meerly void, for it was without consideration. Wray, chief Justice, As to the first point, he was of opinion, That the Recoverers shall be seised to their own use, untill they make the Estate for that was the use implied; for all uses are directed and ruled by the intent implied or expressed of him, to whom the land is, and his intent was, that such Estates should be made, and to such purpose the Recovery was suffered: As if I enfeoff A. unto the use of B. for his life, there it is implied, That B. shall be seised of the Fee to my use, I covenant, That J. S. shall take the profits of my lands for his life, this is a good use of the lands for his life; and he held, that the Recoverors should be seised to their own use, untill, &c. And the Recoverers ought to make the Estates within convenient time, or otherwise the use should be revested again in him who suffered the Recovery; and here the Estate was made within convenient time: And he said, That in every Case where a remainder is limited in abeyance to one by a proper name, the same is not good, but by a general name it is good enough if the party be in esse when the remainder falls: as a remainder limited upon an Estate for life unto the first son, or daughter of J. S. where J. S. at the time hath not any son or daughter, the same is good, if such person shall be in esse, at the time of the death of the Tenant for life, 17 E. 3. A remainder limited Filio primo genito, &c. and 3 E. 3. Fitz. Tail. 8. Land given to J. S. Et uxori quam primo matrimonio duxerit in uxorem, and afterwards he taketh a wife, she shall take by the same Conveyance. And as to the Warranty, This Fine with Warranty was levyed to C. and B. unto the use of himself for life, the remainder to the use of the eldest child, &c. and he intended, That the daughter should not have the benefit of this Warranty; for by the Statute, the possession is removed, and transferred in the Post before the Warranty could attach; and therefore the same shall not bind the son, neither by Voucher, nor by Rebutter: But Tenant by the Curtesie shall have benefit of the Warranty; for although he be in the Post, yet he continueth the Estate which was made to the wife. And as to the point in question, we ought to consider, that the Statute of 27 H. 8. of Uses is, That Cestuy que use shall have the lands in such plight as he had the use, which was without Warranty; and therefore it shall be transferred into possession without Warranty: As to the Lease made by the Infant without rent, profit, or other recompence, he conceived the same to be utterly void; as if he grant a Rent, or an Advowson, he may say, that he did not grant, &c. for the thing included in the Deed, doth not pass, although he delivereth the Deed of Grant, with his own hand: Two joynt-tenants within age, one makes a Lease of years, and dieth, the other shall avoid it; for the Lease is utterly void, of which every stranger may take advantage; but of acts voidable, it is otherwise: As two Infants joynt-tenants, the one Leaseth for life, and makes Livery in person, and dieth, the other shall not avoid it: Two joynt-tenants, the one maketh a Feoffment upon condition, and dieth, the other shall not take benefit of the condition: But here the Lease is meerly void, of which every stranger shall take advantage, and therefore upon this point the Plaintiff shall be barred. And also he was of opinion, That

this

this remainder in abeyance limited, Seniori puero, was not deſtroyed by the Fine, for it is in the conſideration of the Law, and ſo preſerved by the Law; and therefore a deſcent in the time of vacation of an Abbat, ſhall not bind the ſucceſſor; and ſo where the party is beyond the ſeas; for ſuch perſons and their eſtates, the Law privilegeth and preſerveth: So a remainder limited to the right heirs of J. S. And where the King ſeiſeth by reaſon of a Ward, and during ſuch ſeiſin of the King, a deſcent is caſt, the ſame ſhall not bind him who hath right; for he could not enter upon the poſſeſſion of the King: and by the Statute of 32 H. 8. A Recovery had againſt Tenant for life, the remainder unto the right heirs of J. S. who is alive at the time of the Recovery, is not helped by the Statute of 32 H. 8. For the words of the Statute are, To whom the reverſion or remainder ſhall then appertain: See 11 R. 2. Fitz. Detin. 46. and ſo he concluded, becauſe that this remainder is in the cuſtody of the Law, and not in eſſe, it is privileged and preſerved and not deſtroyed by the Fine; and upon iſſue had, the remainder ſhall be executed, notwithſtanding the ſaid act done by the father; and without any entry to be made by the Conuſees to raiſe the uſe, for the remainder limited, Seniori puero, neither was, nor could be diſcontinued: As to the principal point of the Caſe, viz. How theſe words, Seniori puero, ſhall be expounded, although divers authorities have been cited out of Latine Authours, That this word (puer) ſhall be taken for the Male or Female; yet I conceive, That more commonly, it ſhall be taken for the Male than for the Female, and we ought to judge according to the intent of the parties, and not according to the ſtrict ſignification of the word in Latine, eſpecially where it is doubtfull how it ſhall be expounded: 9 H. 7. 16. A. was bound in a Bond upon condition to pay, decem libras auri puri; although there be not any ſuch phraſe in Latine, yet becauſe it appeareth ſo to be the meaning of the Obligee to have fine gold, it was ſo taken: 39 H. 6. 10. and 11. The word (uterque) id eſt, quilibet pro parte ſua, See the Book: ſo it was lately adjudged in the Court of Common-Pleas, where three were bounden, Et eorum uterque, which was conſtrued to be, Quilibet, for we ought always in conſtruction of Deeds, to have regard to the meaning of the parties, and not to argue the aptneſs of the Latine word. And I conceive, That if a Leaſe be made for life, the remainder puero of J. S. who hath a ſon and a daughter, the ſon ſhall have the land, &c. for the moſt worthy ſhall be preferred; and therefore, if a Freeman marrieth a Neife, ſhe is enfranchiſed for ever, according to the opinion of Fitzherbert, which I hold to be good Law, for the husband is the more worthy: So if the Leaſe for life be made to J. S. the remainder to the right heirs of A. B. who hath iſſue three daughters, and dieth, the eldeſt ſhall have the remainder, and not the other with her, becauſe ſhe is the more worthy; and ſo a remainder upon an Eſtate for life of lands in Gavelkind limited to the right heirs of J. S. who hath iſſue two ſons, the eldeſt ſhall have it: So here in the principal Caſe, (Puer) ſhall be expounded ſon, becauſe he is the more worthy: But here are other circumſtances, which give occaſion of another conſtruction; for this doubtfull word (Puer) is explained by the Engliſh Indenture, which the father, W. Humphreſton, cauſed to be made; [Unto the uſe of the eldeſt Child] which is a good expoſition of the former Conveyance: and I am of opinion, that the ſame ought to be meant of the daughter, for ſo ſoon as ſhe is born, the remainder veſts in her, and by the birth of the ſon after ſhall not be devеſted: Land is leaſed to A. for life, the remainder to T. ſon of A. who hath two ſons of the ſame name, the eldeſt ſhall have it, becauſe the more worthy; but, if afterwards the Donor declares his meaning to the contrary, the ſame ſhall ſtand, &c. And afterwards Judgment was given againſt the Plaintiff, and that the daughter ſhould have the Lands.

## CCLXXVI. *Paſch.* 16 *Eliz.* In the King's-Bench.

Poph. 182. Hughs Abr. Tit. Deviſe. 657. Caſe 5. Savile 72,73. Dy. 371. b. Shep. Touch. 449. 15 H. 7. 12. Ante 43. Perk. 547.

A Man deviſed his Lands to his Wife for life, and becauſe he was in doubt whether he ſhould have iſſue or no, he farther willed by his Will, That if he ſhould not have any iſſue by his Wife, that then after the death of his Wife, the lands ſhould be ſold, and the money thereof coming, diſtributed to three of his bloud, and made his Wife and another his Executors, and died; The Executors proved the Will, The other Executor died, and the Wife ſold the lands; and it was the opinion of Wray and Southcote, Juſtices, That the ſale was good, although it be not expreſſed in the Will, by whom the Lands ſhould be ſold; for the moneys coming of the ſale, are to be diſtributed by his Executors, to perſons certain, as Legacies, and it appertains to Executors to pay the Legacies, and therefore they ſhall ſell, &c. As if a man willeth, That his lands ſhall be ſold, and that the moneys coming thereof, ſhall be diſpoſed of for the payment of his debts; now the Executors ſhall ſell the Lands, for to them it belongs to pay debts: Alſo they held, that the Lands ſhould be ſold in the life of the Wife, otherwiſe it could never be ſold; and alſo the ſurviving Executor ſhall ſell the lands, becauſe the authority doth ſurvive.

3 Cro. 278. 3. More 341. 1 Inſt. 113. a. And. 145.

## CCLXXVII. *Paſch.* 16 *Eliz.* In the King's-Bench.

THree men were bounden by Recognizance, jointly and ſeverally, againſt all which the Conuſee ſued forth Execution by Scire facias; and upon iſſue joined, it was found for the Plaintiff in the King's-Bench, and Execution awarded by Capias ad Satisfaciend. And becauſe the ſame erronicè emanavit, being upon a Recognizance, it was drawn off the File; and now the Conuſee brought an Action of debt upon the Judgment againſt one of them, and the opinion of the whole Court was, that it would not lie, becauſe the Judgment was joint againſt them all three.

## CCLXXVIII. *Paſch.* 16 *Eliz.* In the King's-Bench.

A Brought an Action upon the Caſe, and declared, That the Dean and Chapter of Weſtminſter, did leaſe unto him a houſe for years by Deed indented, of which Indenture he was poſſeſſed, and afterwards loſt it, and by Trover it came to the hands of the Defendant, who ſold it, and converted the money thereof coming to his own uſe; The Defendant pleaded, Not guilty; and the Plaintiff gave in evidence, That the ſaid Leaſe was made to him, and to one B. and that the ſaid Indenture was delivered to the ſaid B. (And that was agreed to be the poſſeſſion of them both) and afterwards B. died, and afterwards A. the Plaintiff, was the ſole owner of it: and that was holden to be good Evidence on the part of the Plaintiff; and if the Plaintiff can prove the other part of his Declaration; i. e. that the Indenture came unto the hands of the Defendant, and that he ſold it, that then he ſhould recover. But it was given in Evidence on the Defendants parts, that the ſaid B. ſold to the ſaid Defendant his part and intereſt in the ſaid Leaſe, and alſo the ſaid indenture; ſo as now he is become Tenant in common with the Plaintiff, and then his ſale doth not give any cauſe of Action to the Plaintiff and that was holden by the whole Court to be good evidence without pleading of it; The Caſe went farther; That A. being within age, his father leaſed the lands

for

for 20 years, and afterwards the ſon at his full age upon the back of the Indenture did releaſe to the Defendant all his right; and it was holden by Wray, Juſtice, That when the father leaſed, he did it as Guardian to his ſon; and it was not any Ejectment of the ſon, but it was a Leaſe in the behalf of the ſon, although the ſon might avoid it, and then when the endorſment is ut ſupra, the ſame is a good aſſignment; and afterwards the Plaintiff was Nonſuit.

## CCLXXIX. *Paſch.* 16 *Eliz.* In the King's-Bench.

IN an Action upon the Caſe, the Plaintiff declared, That B. by his Will did deviſe to each of his daughters, he having two daughters, 200 l. and that the ſurvivor ſhould have the whole; and ſhewed farther, that one of his two daughters died, and that B. made his Wife his Executrix, and that the ſaid wife took to husband the Defendant; and farther declared, That the Defendant in conſideration of all that, and that the Defendant ſhould take the ſurviving daughter to wife, and in conſideration that the Defendant had Aſſets to pay all Debts and Legacies, &c. did promiſe to pay to the Plaintiff 400 l. at four ſeveral days: The firſt day of payment incurred, and no money was paid, whereupon the Plaintiff brought the Action; the Defendant pleaded, That he made no ſuch promiſe; and it was found for the Plaintiff, and damages were aſſeſſed for the default of payment at the firſt day; and that was moved in arreſt of Judgment, becauſe the Aſſumpſit was intire, and the Plaintiff ought to have forborn his ſuit until all the days of payment were paſt, and then to have one entire Action for the whole; but the opinion of the whole Court was againſt that; for they ſaid, It is not like unto a Debt upon a Contract, or a Bill, where the debt is to be paid at ſeveral days; for here no debt is to be recovered but onely damages for the debt; and this default of payment is a wrong, and therefore the Action will well lie, and ſo it was adjudged.

## CCLXXX. *Paſch.* 16 *Eliz.* In the King's-Bench.

A Deviſed, that his lands ſhould deſcend to his ſon, but he willed, That his wife ſhould take the profits thereof until the full age of his ſon, for his education and bringing up, and died; the wife married another husband, and died before the full age of the ſon; and it was the opinion of Wray and Southcote, Juſtices, That the ſecond husband ſhould not have the profits of the lands until the full age of the ſon; for nothing is deviſed to the wife but a confidence, and ſhe is as Guardian, or Bailiff for to help the Infant, which by her death is determined; and the ſame confidence cannot be transferred to the husband; but contrary, if he had deviſed the profits of the land unto his wife until the age of the Infant to bring him up and educate him, for that is a Deviſe of the land it ſelf.

1 Cro. 252. Hob. 285. Dyer. 251. a. Dy. 210. a. 3 Len. 9. 79. Yel. en Ayleff & Choppins Caſe. Vaugh. 184.

*Paſch.* 16 *Eliz.* In the Common-Pleas.

## CCLXXXI. Bawell *and* Lucas's *Caſe.*

IN a Replevin by Bawell againſt Lucas; It was agreed by all the Juſtices, viz. Mounſon, Manwood, Harper and Dyer, That if a man ſeiſed of a Manor, leaſed part of the Demeans for years, or for life, That the reverſion doth remain parcel of the Manor; but ſuch a Reverſion by the Grant of the Manor, doth not paſs without Attornment of

of the Leſſee: And where a Manor is granted by Feoffment unto another, and afterwards the Tenants attorn, the ſervices paſs by the Livery and not by any Grant; and although in the firſt Grant the Leſſee doth not attorn, but a long time after, yet the Reverſion is not ſevered from the Manor; for the Attornment, as to that intent, ſhall have relation to the Livery to make the Reverſion to paſs from the time of the Grant, but not to charge the Leſſee with Waſte: and Dyer ſaid, That if a Feoffment in Fee be made of a Manor, with an Advowſon appendant, and the Tenants do not attorn, yet the Feoffee ſhall have the Advowſon; for the Advowſon is appendant to the principal part of the Manor, (ſcil.) the Demeans, and cannot be appendant to the ſervices: and Dyer ſaid, That if A. maketh a Feoffment in Fee of a Manor, part of which is in Leaſe for years, Habendum to the Feoffee and his heirs, to the uſe of the Feoffee and his heirs upon condition that the Feoffee ſhall pay to the Feoffor within ten days, 1000 l. and if he fail, then to the uſe of the Feoffor for life, the remainder to the uſe of his ſon in tail, and the money is not paid, the Leſſee attorns after the ten days to the Feoffee, the ſame is a good Attornment to raiſe ſecondary uſes, although that the firſt uſes did not take effect; for the condition is not annexed to the Eſtate of the Land but unto the uſe onely: and the meaning was, that the Feoffor ſhould never have again the Inheritance: A Feoffment is upon condition, that the Feoffee ſhall give the Land in tail to a ſtranger, who refuſeth the gift, there the Feoffor may re-enter; but a Feoffment upon condition to enfeoff a ſtranger, or to grant a Rent-charge, if the ſtranger refuſeth, there the Feoffor ſhall not re-enter, for his intent was not, that the Land ſhould revert, &c.

2 Leon. 265, 266.

*Hill.* 16 *Eliz.* In the Common-Pleas.

## CCLXXXII. Vavaſor's *Caſe*.

THE Caſe was, That Nicholas Ellis ſeiſed of the Manor of Woodhall, leaſed the ſame to William Vavaſor and his wife, for the life of the wife, the remainder to the right heirs of the husband: The husband made a Feoffment in Fee to the uſe of himſelf and his wife for their lives, the remainder to his right heirs, the husband died, the wife held in, and committed waſte in a Park, parcel of the Manor; It was moved, If the Writ of Waſte ſhall ſuppoſe that the wife holdeth in, Ex dimiſſione Nichol. Ellis, or Ex dimiſſione viri: and the opinion of all the Juſtices was, That the Writ upon this matter ought to be general; viz. That ſhe holds in, de hæreditate, J. S. hæredis, &c. without ſaying, ex dimiſſione hujus, vel illius, for ſhe is not in by the Leſſor, nor by the Feoffees, but by the Statute of Uſes; and therefore the Writ ſhall be, Ex hæreditate, &c. And alſo the opinion of the Juſtices was, That the wife in this caſe, is not remitted, but that ſhe is in according to the form of the Feoffment: Dyer, The Formedon brought againſt Manures, rehearſed in the Writ, a Will and divers Conveyances, by reaſon of which, the Writ was of exceeding length; and in ſuch caſes the Writ is good; yet if the Writ be general, it is ſufficient. Note in this Caſe, That the Plaintiff aſſigned the waſte in deſtroying of Deer in the Park: And Mead, Serjeant, ſaid, That waſte cannot be aſſigned in the Deer, unleſs the Defendant hath deſtroyed all the Deer, and of that opinion was Dyer: Manwood, If the Leſſee of a Pigeon-houſe deſtroy all the old Pigeons but one or two couple, the ſame is waſte; and if the Keeper doth deſtroy all the Deer, ſo as the ground is become not Parkable, the ſame is waſte, although he hath not deſtroyed the

the whole? See 8 R. 2. Fitz. Waſt. 97. If there be a ſufficient ſtore left in a Park, Pond, &c. it is well enough, &c.

*Hill.* 16 *Eliz.* In the Common Pleas.

## CCLXXXIII. Mutton's *Case.*

JAne Mutton brought a Writ of Entry, Sur diſſeiſin, againſt Anne Mutton who pleaded, That one John Mutton was ſeiſed, and levyed a Fine to the uſe of himſelf, and ſuch wife and wives as the ſaid John ſhould after marry, by what name or names they ſhould be called, for term of their lives, and afterwards to the uſe of the ſame Jane, now Demandant in tail, the remainder over to the right heirs of the ſaid John Mutton, and afterwards the ſaid John Mutton took to wife, the now Tenant, upon which Bar the Demandant did demur in Law. And it was argued by Jeffries, Serjeant, That here the wife taketh nothing by this limitation, becauſe ſhe was not capable thereof at the time of the limitation; But if the uſe had been limited eſpecially to John Mutton, untill he took a wife, and then unto the uſe of him and his wife for their lives, the ſame had been a good uſe to the wife; But in our Caſe, the uſe is limited to the wife in præſenti, and not upon a contingent; and becauſe the wife at the time of the limitation was not capable, ſhe ſhall never take after; and yet it may be ſaid, That a joynt Eſtate may be in eſſe, and yet to begin at ſeveral times: as 18 E. 4. 12. A Feoffment is made to three, and Livery is made to one of them; and firſt one of them agrees to the Livery, and a year after, another agreeth, and afterwards the third; although they take nothing untill agreement, yet when they have agreed, the agreement ſhall have relation to the time of the Livery; but in truth, the reaſon thereof is, becauſe the Freehold ſhall be adjudged in them all, untill they have diſagreed. And if a diſſeiſin be to the uſe of A. B. and C. And firſt A. agrees to it, and afterward B. and after C. although they took nothing untill agreement, yet when they have agreed, their agreement ſhall have relation to the time of the firſt diſſeiſin; and if in ſuch caſe the Diſſeiſor had made a Leaſe before agreement, the party to whoſe uſe after agreeing, ſhall avoid ſuch Leaſe.

1 Anderſ. 42. More 96.

13 Co. 48, 49 & 54, 55, 56. 1 Co. 101. 3 Len. 253.

*Hill.* 16 *Eliz.* In the Common Pleas.

## CCLXXXIV. Stamford's *Case.*

THE Caſe was, A. took a wife, and afterwards married Elizabeth Stamford, living his firſt wife, and by Deed gave part of his goods to the ſaid Elizabeth; and as to the reſidue of his goods, being but of ſmall value, he made the ſaid Elizabeth his Executrix, and died; ſhe refuſed the Executorſhip, for which the Ordinary committed Adminiſtration to B. Gawdy, Serjeant, asked the advice of the Court, againſt whom the Action of Debt ſhould lie? for, if the Creditor impleadeth the Adminiſtrator, he hath not Aſſets; if the Executrix her ſelf, ſhe will plead that ſhe hath renounced the Executorſhip, and that Adminiſtration is committed to B. And the opinion of Dyer, Juſtice, was, That the Gift is void by the Common Law, and alſo by the Statute of 13 Eliz. and then, if the Gift be void any way, the Creditor may have an Action of Debt againſt the ſaid Elizabeth as Executor of her own wrong: And ſee that ſuch a Gift is void by the Common Law, 43 E. 3. 2. And by Manwood, Juſtice, He who takes the goods of the dead, ſhall not be charged as executor of his own wrong, unleſs

unleſs he doth ſomething as Executor: as to pay Debts, make Acquittances, &c. See 41 E. 3. 31. 32 H. 6. 7. Dyer, If one takes the goods of the dead, and converteth them to his own uſe, he is chargeable as Executor, and ſo it hath been adjudged in the time of this Queen, in the Caſe of one Stokes, which was affirmed by Bendloes and Harper: See now Co. 2 Part. 53. Reade's Caſe; where no lawfull Executor, or Adminiſtrator is, there, if a ſtranger takes the goods of the dead into his poſſeſſion, the ſame is a good Adminiſtration to charge him as Executor of his own wrong.

CCLXXXV. *Hill.* 19 *Eliz.* In the Common-Pleas.

Ante 178. THE Caſe was, A man made a Feoffment in Fee to the uſe of himſelf for life, and afterwards to the uſe of his eldeſt ſon in tail; and after, to the uſe of his right heirs, not having at the time of the Feoffment any ſon; afterwards he ſuffered a common Recovery, had iſſue a ſon, who died in the life of his father, having iſſue a ſon, and afterwards he himſelf died; It was holden by the Juſtices in this Caſe, That the ſon and heir of the ſon ſhould not avoid this Recovery by the Statute of 32 H. 8. for there was not any remainder in him at the time of the Recovery had, and the words of the ſaid Statute are, That ſuch Recovery ſhall be void againſt ſuch perſons to whom the reverſion, or remainder ſhall then appertain, i. e. at the time of ſuch Recovery. And it was ſaid by one of the Serjeants at Bar; That if lands be given to E. for life, the remainder to B. in tail, the remainder to C. in Fee, B. dyeth, his wife young with child, with a ſon; a Recovery is had againſt E. with the iſſue of C. and afterwards the ſon is born, he ſhall not be helped by this Statute of 32 H. 8. for that remainder was not in eſſe, at the time of the Recovery. But it was holden in the principal Caſe, That the heir might avoid the ſaid Recovery by the Common Law; for the recompence cannot extend to ſuch a remainder, which is not in eſſe.

*Paſch.* 27 *Eliz.* In the Common Pleas.

CCLXXXVI. Sidenham *and* Worlington's *Caſe*.

1 Cro. 42. IN an Action upon the Caſe upon a Promiſe, the Plaintiff declared, That he at the requeſt of the Defendant, was ſurety and bail for J. S. who was arreſted in the King's Bench, upon an Action of 30l. and that afterwards, for the default of J. S. he was conſtrained to pay the 30l. after which, the Defendant meeting with the Plaintiff, promiſed him for the ſame conſideration, That he would repay that 30l. which he did not pay, upon which the Plaintiff brought the Action; the Defendant pleaded, Non aſſumpſit, upon which iſſue was joyned, which was found for the Plaintiff. Walmſley, Serjeant, for the Defendant, moved the Court, That this conſideration will not maintain the Action, becauſe the conſideration and promiſe did not concur and go together; for the conſideration was long before executed, ſo as now it cannot be intended that the promiſe was for the ſame conſideration, As if one giveth me a Horſe, and a Month after, I promiſe him 10l. for the ſaid Horſe, he ſhall never have Debt for the 10l. nor Aſſumpſit upon that promiſe; for there is neither contract, nor conſideration, becauſe the ſame is executed: Anderſon, This Action will not lie; for it is but a bare agreement, & nudum pactum, becauſe the contract was determined, and not in eſſe at the time of the promiſe; But he ſaid, it is otherwiſe upon a conſideration of marriage of one

of

of his coſins; for marriage is always a preſent conſideration: Windham agreed with Anderſon, and he put the Caſe in 3 H. 7. If one ſelleth a Horſe unto another, and at another day he will warrant him to be ſound of limb and member, it is a void warrant, for that ſuch warranty ought to have been made or given at ſuch time as the Horſe was ſold: Periam, Juſtice, conceived, That the Action did well lie; and he ſaid, That this Caſe is not like unto the Caſes which have been put of the other ſide: For there is a great difference betwixt Contracts and this Caſe; for in Contracts upon ſale, the conſideration, and the promiſe, and the ſale, ought to meet together, for a Contract is derived from con and trahere, which is a drawing together, ſo as in Contracts every thing which is requiſite, ought to concur and meet together, viz. the conſideration of the one ſide, and the ſale or the promiſe on the other ſide; But to maintain an Action upon an Aſſumpſit, the ſame is not requiſite, for it is ſufficient, if there be a moving cauſe or conſideration precedent, for which cauſe or conſideration the promiſe was made; and ſuch is the common practice at this day: For in an Action upon the Caſe, upon a promiſe, The Declaration is laid, That the Defendant, for and in conſideration of 20l. to him paid (poſted 10l.) that is to ſay, at a day after ſuper ſe aſſumpſit, and that is good, and yet there the conſideration is laid to be Executed; And he ſaid, that the Caſe in Dyer, 10 Eliz. 272. would prove the Caſe: For there the Caſe was, That the Apprentize of one Hunt, was arreſted when his Maſter Hunt was in the Country, and one Baker, one of the neighbours of Hunt, to keep the ſaid Apprentize out of priſon, became his bail, and paid the Debt; afterwards Hunt the Maſter, returning out of the Country, thanked Baker for his neighbourly kindneſs to his Apprentize, and promiſed him, that he would repay him the ſum which he had paid for his ſervant and Apprentize: And afterwards, upon that promiſe, Baker brought an Action upon the Caſe againſt Hunt, and it was adjudged in that Caſe, that the Action would not lie, becauſe the conſideration was precedent to the promiſe, becauſe it was executed and determined long before. But in that Caſe, it was holden by all the Juſtices, That if Hunt had requeſted Baker to have been ſurety or bail, and afterwards Hunt had made the promiſe for the ſame conſideration, the ſame had been good, for that the conſideration did precede, and was at the inſtance and requeſt of the Defendant. Rhodes, Juſtice, agreed with Periam; and he ſaid, That if one ſerve me for a year, and hath nothing for his ſervice, and afterwards, at the end of the year, I promiſe him 20l. for his good and faithfull ſervice ended, he may have and maintain an Action upon the Caſe upon the ſame promiſe, for it is made upon a good conſideration; but if a ſervant hath wages given him, and his Maſter, ex abundanti doth promiſe him 10l. more after his ſervice ended, he ſhall not maintain an Action for that 10l. upon the ſaid promiſe; for there is not any new cauſe or conſideration preceding the promiſe; which difference was agreed by all the Juſtices, and afterwards, upon good and long advice, and conſideration had of the principal Caſe, Judgment was given for the Plaintiff, and they much relied upon the Caſe of Hunt, and Baker, 10 Eliz. Dyer, 272. See the Caſe there.

a good derivation & ask Judge Parker

this is a remarkably well considered case
Kit

*Trin. 25 Eliz.* In the Common-Pleas.

## CCLXXXVII. Higham's *Case*.

1 Cro. 15. More 221. 3 Len. 130.

IT was found by ſpecial Verdict, That Thomas Higham was ſeiſed of 100 Acres of Lands, called Jacks, uſually occupied with a Houſe; and that he let the ſaid Houſe, and 40 of the ſaid 100 Acres to J. S. for life, and made his Will, by which he deviſed the ſaid Houſe, and all his Lands called Jacks, then in the occupation of the ſaid J. S. unto his Wife for life, and that after the deceaſe of his Wife, the remainder thereof, and of all his other Lands belonging to Jacks, ſhould be to R. his ſecond ſon, &c. And by Mead, The Wife ſhall not have by implication the reſidue of Jacks; for ſhe had an expreſs Eſtate in the Houſe and 40 Acres of Lands, and having expreſſed his Will concerning the ſame, it ſhall not be extended by implication; and he ſaid, It had been adjudged between Glover and Tracy, That if Lands be deviſed to one, and the heirs Males of his body, and if he die without heirs of his body, that then the Land ſhall remain over, that the Donee hath but an Eſtate in tail to the heirs Males of his body: Anderſon, in the time of Sir Anthony Brown, it was holden that if a man ſeiſed of two Acres of Lands, deviſeth one of them to his Wife for life, and that J. S. ſhall have the other Acre after the death of his Wife, that the Wife hath not any Eſtate in the latter Acre. It was alſo moved, What thing ſhall paſs to his ſecond ſon by this Deviſe? and by the Lord Anderſon, The words, uſually occupied with it, amount to the words, the Lands let with it; but theſe 60 Acres are not let with it, therefore they ſhall not paſs: Windham contrary; Although they do not paſs by the words, occupied with it, yet they ſhall paſs by the name of Jacks, or belonging to Jacks; and afterwards, Anderſon, mutata opinione, agreed with him.

1 Roll. 839.

A TA-

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